Central Law Journal.

ST. LOUIS, MO., DECEMBER 2, 1898.

The case of Mullett v. Bradley, recently decided by the Supreme Court of New York, forcibly recalls Blackstone's Commentaries, being an interesting application of ancient principles of law. It was there held that where a sea lion had escaped from its possessor's control, and disappeared, and was recaptured between two and three weeks thereafter in the sea, about seventy miles from the place of its escape, such possessor had forfeited his qualified right of property in the animal, since it had regained its liberty without *animus revertendi*, though it had not reached its native place or an environment specially adapted to its existence.

Unquestionably, the court correctly administers the general, historical rule of law governing rights of this class. The words of Blackstone on the subject are that animals *ferœ naturœ* "are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases, unless they have *animus revertendi*, which is only to be known by their usual custom of returning." The *New York Law Journal*, in commenting upon this case very properly suggests that the ancient rule is not adequate for present needs and conditions. Of course, it could not be claimed that when Blackstone wrote wild animals were not occasionally used for purposes of exhibition and amusement. But such use was not as wide-spread then as it is at present, and it would seem that Blackstone's rule had its principal application to wild animals viewed merely as game.

"One modification at least" says that journal "seems to have been grafted upon the old common law doctrine in this country. In Ulery v. Jones, decided in the Supreme Court of Illinois in 1876 (81 Ill. 403), it was held that a wild buffalo that had been captured when a calf, and reared on a domestic cattle farm, and became so tame as to take food from the hands of its master like other cattle, and to be easily driven home when it strayed away, is no longer *ferœ naturœ*, but is the subject of property, and for any trespass committed by it the owner is liable, and for any injury done to it by others he can recover damages. The opinion in this case cites the rule from Blackstone in question, and distinguishes the controversy from its operation. Of course, in the Illinois case there was the element that the wild nature had apparently been overcome, and that the animal was substantially domesticated. Is there, however, any essential difference between such a case and that, for instance, of a dancing bear, or other wild animal, that, although not qualified to mingle on terms of social equality with ordinary domestic beasts, is still substantially redeemed from barbarism as well as liberally educated? If an animal of the latter class should make his escape, it seems to us that ordinary justice and the usual analogies of the law would require that the original owner be permitted to reclaim him as ordinary property. The opinion in Mullett v. Bradley expressly holds that escape to a native place or a natural environment is not necessary in order to divest the qualified owner's title. Therefore, we do not see why the rule laid down in this New York case would not apply if a menagerie train were wrecked, and such of the animals, no matter how valuable, as were uninjured had escaped. Large amounts of capital and much industry are now invested in menageries and in tamed animals for various kinds of 'shows," and such business enterprises are sanctioned by law. It, therefore, seems to us that the universal application of the rule laid down in Mullett v. Bradley might lead to very grave injustice. In the New York case considerable might have been made of the point of abandonment, the owner having 'made no effort to regain it (the sea lion) after its loss, but immediately surrendered all hope of its recovery.' The case of Buster v. Newkirk, 20 Johns. 75, is referred to as illustrating the general principle on which the claim to abandonment is founded. See also Story Sales, section 211. The court, however, did not seriously consider this point. It certainly would seem that Blackstone's rule above quoted should not be extended, but at least very strictly construed."

NOTES OF IMPORTANT DECISIONS.

EXECUTORS AND ADMINISTRATORS—ERRONEOUS PAYMENTS.—Two recent decisions, reported in the *New York Law Journal*, have brought to the notice of the profession the question of the *status* of erroneous payments made by executors. In Phillips v. McConica, 51 N. E. Rep. 445, in the Supreme Court of Ohio, it was held that a voluntary payment made by an executor under a mistake of law cannot be relieved against. It appeared that the payment in question was made under the mistaken assumption that a certain infant inherited a legacy. Upon the executor subsequently bringing suit to recover back the money so paid, it was held that the action would not lie as the payment was a voluntary one, without mistake of fact, and made only under a mistake of law. The following is from the opinion: "In Thompson v. Thompson, 18 Ohio St. 73, it was held by this court that 'mistake as to the law of descents, where the intention in making a deed was to vest the estate conveyed in the grantee, affords no ground for relief in equity.'

"In City of Cincinnati v. Gaslight & Coke Co., 53 Ohio St. 278, 41 N. E. Rep. 239, this court held that 'a payment made by reason of a wrong construction of the terms of a contract is not made under a mistake of fact, but under a mistake of law, and, if voluntary, cannot be recovered back.' The payment, as disclosed in the petition, was voluntary, and not under duress, and not under mistake of fact, and in such cases the holdings of this court have been that no recovery can be had. Mays v. City of Cincinnati, 1 Ohio St. 268; City of Marietta v. Slocomb, 6 Ohio St. 471; Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. Rep. 486. The executor had the right to obtain the judgment of the court as to the proper person to receive this money, as was done in Upson v. Noble, 35 Ohio St. 655; Rev. St. sec. 6202. But, knowing all the facts, he did not seek the direction of the court, but, relying upon his own judgment, paid the money at his own peril. If he intended to litigate the matter, he should have litigated before payment. It is now too late, unless he can show that he paid it under a mistake of fact, and this his petition fails to show.

"In the decision of the New York Supreme Court, appellate term, in Lawyers' Surety Company of New York v. Reinach, 1898, it was held where an administrator had paid out moneys of the estate under a decree of a surrogate's court, which decree was subsequently reopened by the surrogate, and a new modifying decree made, reducing the original payment directed, upon the discovery that there were additional persons interested in the estate, that the administrator or his assignee could recover in an action the moneys overpaid under the first decree. The opinion of Judge Giegerich, in the latter case, which elaborately reviews the authorities upon the subject, emphasizes the fact that the payment thus practically relieved against was not a voluntary payment, but was made under the sanction of a judicial decree. It is true that in the New York case the opening of the original surrogate's decree was largely based upon the discovery that additional persons were interested in the estate, so that, as far as the action of the surrogate was concerned, it might be contended that the real ground was a mistake of fact. Nevertheless, the question was discussed upon the theory of the right of a party to restitution of moneys paid under an erroneous judgment, and the opinion of Judge Giegerich makes it quite plain that such general right ought to apply to judgments of accounting and distribution in surrogates' courts.

"In the Ohio case above cited the court held that an action to recover back money paid out by an executor upon distribution, by mistake is properly brought, if it will lie at all, in the name of such executor in his official capacity. Such ruling agrees in principle with that of the New York Supreme Court, appellate term, in Lawyers' Surety Company v. Reinach, *supra*. In the latter case it was held that the right of an administrator to restitution is not personal but exists in his representative capacity, and moneys subject to restitution are not subject to demands and setoffs against the administrator individually, and, further, that statements made by the administrator, respecting the persons interested in the estate of his intestate, upon the faith of which a party claims to have been led to buy the shares of next of kin, do not create an estoppel against the estate. This branch of the subject is also ably discussed in the opinion in the New York case."

CARRIERS—INJURIES TO PASSENGERS—MIXED TRAINS—ASSUMPTION OF RISK.—In Olds v. New York, New Haven & Hartford R. R. Co., 51 N. E. Rep. 450, decided by the Supreme Judicial Court of Massachusetts, it was held that a passenger who knowingly rides on a train composed of freight and passenger cars, regularly run on a branch road, where no other train is required by the traffic, assumes additional risks incident thereto. The court said in part: "This is an action to recover damages for an injury received by the plaintiff while riding in a car of the defendant corporation. The case was tried without a jury. The judge found that the jerking and jolting were 'greater and more severe than would occur on an ordinary passenger train running under due care, and ruled that if the liability in respect to preventing injury by jolting and jerking and stopping suddenly is the same, and if the obligations are the same in all these respects, on a freight or mixed train, such as this train was, as on an ordinary passenger train, the plaintiff is entitled to recover; * * * but, if the defendant was not liable for such jolting and jerking as was ordinarily incident to a train of this kind, the plaintiff was not entitled to recover.' By agreement of the parties, the case was reported to this court. If the ruling was correct, judgment is to be en-

tered for the defendant; if incorrect, for the plaintiff. It must be assumed that on the findings of fact this is the only disputed proposition of law which was considered at the trial. The accident occurred on a branch line of the defendant's railroad, about ten miles in length, extending from South Deerfield to Turner's Falls, in the town of Montague. The trains running on this branch of the railroad are usually made up of freight cars and a car known as a 'combination car,' one part of which is fitted with seats for the conveyance of passengers, and another part is adapted to carrying baggage. It is reasonably to be inferred that there is not sufficient business over this part of the railroad to warrant the running of trains for carrying passengers only. If, under these circumstances, the defendant was legally bound to provide for the plaintiff, at the place of the accident, a train made up of passenger cars only, or to conduct its business in such a way as to start and stop its trains with no more jerking or jolting than is common in running ordinary passenger trains, the defendant is liable; otherwise it is not. The nature of the defendant's business on this line, and the mode of conducting it, were well known to the plaintiff, and he must be assumed to have made his contract for carriage in reference to existing conditions. It is obvious that common carriers must adapt their vehicles and methods to the business to be done. There is every kind of business to be provided for in different places, from the carrying of thousands of tons of freight and tens of thousands of passengers per day over a single line, to the maintenance of lines over which only an occasional passenger will pass and a few small articles of merchandise be carried. In some places long passenger trains, with the best possible equipment for safety and comfort, are reasonably required; in others, a single horse and a cheap wagon are all that can be maintained from the income of the business for which provision is to be made, and all that reasonably can be expected. It is the duty of a carrier of passengers to exercise 'the utmost care consistent with the nature of his undertaking, and with due regard for all the other matters which ought to be considered in conducting the business.' Dodge v. Steamship Co., 148 Mass. 207-218, 19 N. E. Rep. 373. If the business of a given line is the running of trains for freight with a car attached for passengers, the care required is such as ought to be exercised in running such trains. The law is clearly expressed in Railroad Co. v. Arnol, 144 Ill. 261, 33 N. E. Rep. 204, as follows: 'Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences and all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the conditions provided by the company, subject to all of the ordinary inconveniences and delays and hazards incident to such trains, when made up and equipped in the ordinary manner of making and equipping such trains, and managed with proper care and skill. * * * But if a railway company consents to carry passengers for hire by such trains, the general rule of its responsibilities for their safe carriage is not otherwise relaxed. From the composition of such a train, and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight trains as there is by passenger trains; but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different, because of the inherent hazards incident to the operation of one train, and not to the other; and it is these hazards the passenger assumes in taking a freight train, and not hazards or peril arising from the negligence or want of proper care of those in charge of it.' Principles decisive of the present case are stated in Le Barron v. Ferry Co., 11 Allen, 312, and in Heyward v. Railroad Co., 169 Mass. 466, 48 N. E. Rep. 773. See also Dodge v. Steamship Co., 148 Mass. 207-218, 19 N. E. Rep. 373; Railroad Co. v. Axley, 47 Ill. App. 307; Dunn v. Railway Co., 58 Me. 187-197; Lusby v. Railway Co., 41 Fed. Rep. 181-184; Railroad Co. v. Dickerson, 59 Ind. 317. The plaintiff in the present case well understood the kind of business in which the defendant was engaged, and the manner in which the business was conducted. So far as there were dangers naturally incident to the running of freight cars and a passenger car in the same train, the parties must be presumed to have contracted in reference to them, and the plaintiff to have assumed them."

HUSBAND AND WIFE—LETTER OF CREDIT—ESTATE BY ENTIRETIES.—In *Re* Parry's Estate, 41 Atl. Rep. 448, decided by the Supreme Court of Pennsylvania, it was held that a letter of credit taken in the names of a husband and wife jointly, though purchased with the husband's money, creates an estate by entireties, as between them, therein and an unexpended balance due thereon at the husband's death becomes the property of the wife. The court said in part: "We are clear the writings created an estate, as between husband and wife, by entireties, and such an estate, at common law, goes to the survivor. This estate may be created in a chattel as well as realty; in a chose of action and one in possession. Freem. Co-Ten. secs. 63, 68. And, as to choses in action, it is not abolished by the legislation effecting joint tenancy; for an estate that, as to unmarried persons, would be a joint tenancy, as to husband and wife is a tenancy by entireties. Therefore, neither the Act of March 31, 1812, that of April 11, 1848, nor that of June 3, 1887, applies. This question is fully discussed by our Brother McCollum in *Re* Bramberry's Estate, 156 Pa. St. 628, 27 Atl. Rep. 405. These letters of credit, on their face, have nothing to distinguish them, in their legal consequences, from a dra drawn in favor of the husband and wife as pave

by the American bankers on the foreign ones, or from a certificate of deposit or promissory note to them jointly, all of which have been held to constitute an estate by entireties. It was not an absolute gift to the wife of the whole amount, nor intended so to be. It was an estate in personalty, the value of which to her depended on two contingencies: (1) On her survivorship during the life of the letters; (2) on how much was still payable at his death. Both contingencies happened, and she survived as to so much of the estate as had not been spent.

"The fact that they were going abroad, and that this was a convenient method of providing money for their expenses, does not rebut, or even cast doubt on, the intention expressed in the writings. The husband procured to be framed and delivered an instrument which effects certain legal consequences on the happening of certain contingencies. He knew that by means of it either could readily obtain money in foreign countries; that, if both survived to return home, he could receive from the bankers who issued the letters, the estate being personalty, any balance not expended; that, if he died abroad, the surviving wife took all that was left. There is not a spark of evidence indicating that any other intention than that which legally arises on the face of the paper. In fact, he may have very reasonably intended that, if he died abroad among strangers, his widow should immediately be possessed of funds sufficient for her necessities and comfort, independent of any provision made for her in his will. Appellees argue that by such construction, if a letter of credit were issued for an indefinite amount, it would enable the widow to sweep the entire estate. We think it highly improbable that any banker would issue a letter of credit for an indefinite amount, which would enable the wife to sweep her husband's entire estate, and perhaps the banker's too; but, if such a letter were issued at the request of the husband, the presumption would be quite strong that he intended his wife should have his entire personal estate in case of his death. However, any improbability as to intention which might possibly be raised by such an extreme case is without weight here, for the husband took the letters for a limited amount, probably not one-twentieth of his large estate."

ELECTIONS—POLITICAL CONVENTIONS—NOMINATIONS.—In Hutchinson v. Brown, Secretary of State, 54 Pac. Rep. 738, decided by the Supreme Court of California, it was held that where a convention of a political party is regularly called and organized, its nominees, and not those of a convention made up of a minority of the delegates, who withdrew from the regular convention, are entitled to have their certificates filed by the secretary of state, though the delegates violate pledges, and disregard the advice of the executive committee, in that they nominate certain men who do not belong to the party, and make a bargain by which some of the nominees are to retire in favor of the nominees of other parties. The court said in part: "The law governing the case is found in the Political Code, sec. 1185, *et seq.*, as construed by this court in a number of cases which we have had occasion to consider. It was determined in McDonald v. Hinton, 114 Cal. 484, 46 Pac. Rep. 870, that a political party can be represented by but one convention, and, in case the chairmen and secretaries of two rival conventions present certified lists of nominees for filing, the officer whose duty it is to file such certificates should determine which of the two rival conventions really represents the party, and file its certificate, rejecting the other, notwithstanding it may be formally correct and sufficient. A question was discussed in that case which the court found it unnecessary to decide, viz., whether the decision of the registrar (or in this case the secretary of state) is final, or subject to review and correction by the courts. In this case that question cannot be avoided, but it will not require any particular examination, since both parties to the controversy concede that the court not only may, but must, determine upon the admitted facts, whether, as matter of law, the secretary should have filed the certificate which he rejected, and should have refused to file the certificate which he accepted. It is conceded that both certificates are regular in form, duly authenticated, and that all the conditions of the statute relative to their presentation have been fully complied with. The only question is, which emanated from the regular and authorized convention of the party? Upon this point we are satisfied that the respondent erred in his conclusion. It is clear that the full convention was regularly called and organized; and that only about one-third of its members withdrew after the nomination of Judge Maguire. The withdrawal of a minority of the delegates present did not dissolve the convention or destroy its identity. It remained as before, the people's convention, with full authority to nominate a ticket to be voted for at the election. The fact—if it be a fact—that some or all of the delegates who remained were violating pledges or sacrificing party interests in nominating Judge Maguire and adopting the plan of fusion presents a question with which neither the secretary of state nor the court has the slightest concern. That is a matter to be settled between them and their constituents. Delegates to political conventions are, no doubt, trustees, in a large sense of the word, but they discharge a trust with which the courts do not meddle. They obey or disobey instructions as they see fit, and the only remedy for their disobedience is the censure of the people, expressed at the polls. This is true, at least so far as the ballot law is concerned. All the filing officer has to determine is whether the certificate offered for his acceptance emanates from the regular convention of the party. It is no concern of his whether the delegates to the convention have nominated members of their own party, or of

other parties; whether the nominees are there to stay, or to be taken down. There is nothing unlawful in fusion. The statute does not forbid it, or attempt to do so, and a statute which did attempt it would be of very doubtful validity. It is for the conventions of different party organizations to decide for themselves whether their principal objects are so far common and paramount over minor issues as to justify them in uniting upon a list of nominees drawn from all parties so agreeing. And, even if they had nothing else in common except a desire to fill the offices, there is no power to prevent them from combining for that object. One objection of the respondent is that, by the call of the executive committee, the People's Party convention was assembled for the purpose of nominating a full ticket, and, of course, a full ticket of Populists, and that if there was to be any fusion, or joint action with other parties, it was only to be the action prescribed by the executive committee, and put forth as part of the call for the convention. As to this, it is enough to say that, according to universal party usage in California, the central or executive committee of a party has no function, after one election is over, except to preserve the organization, and take the necessary preliminary steps for the assembling of the next convention. It has no right to forestall or in any manner limit or curtail the powers of the convention which it calls. The convention, when assembled, is the depositary of all party power, and so continues until it adjourns, after which a new committee comes into power for the mere purpose of subserving the party interests pending the election, and of doing thereafter such things as may be provisionally necessary to keep up the regular organization, and call another convention. It is, therefore, of no consequence what resolutions the executive committee chose to couple with its call to the People's Party convention. They were merely advisory, and, as advice, were worth just what the convention chose to rate them at. This case is not like the Michigan cases upon which the respondent relies to sustain his action. The People's convention did not adjourn, and its members unite with members of other conventions in the formation of a new convention, whereby its identity would have been destroyed. It continued its session by itself, and by itself nominated a full ticket as a Populist ticket. It proceeded regularly, and its action cannot be questioned because it nominated men who were not Populists, and made a bargain by which some who were Populists were to retire in favor of Democrats or Silver Republicans. It may be true that the result is the same as it would have been if the three conventions had fused. But the result is not what the ballot law is concerned with. What it demands is not a ticket of Simon-pure Populists, but only a ticket certified by the chairman and secretary of a regular Populist convention. The character and politics of the candidates are not the subject of inquiry for the secretary of state, but only for the voters. There is a wide difference between a fusion convention and a fusion ticket. A fusion convention represents no particular party. A fusion ticket may represent several parties, but is none the less entitled to a place on the official ballot for that reason. Several conventions holding separate sessions do not lose their identity by selecting the same set of nominees. The effect may be to cause difficulty at the next election, from the impossibility of ascertaining the vote of the respective parties, but that is a difficulty to be dealt with when we come to it."

THE LIABILITY OF A BORROWING MEMBER OF AN INSOLVENT BUILDING AND LOAN ASSOCIATION.

In case a member of a building and loan association instead of remaining a mere investor becomes also a borrower from the association, the question as to the relation between payments made by him upon his stock and the debt he owes the association has given rise to much confusion in the decisions of the various courts. In North Carolina it was said that the transactions must be treated upon the basis of an actual loan of money and subsequent partial payments therefor by the borrower. The same view was taken by the early Pennsylvania cases. In these Pennsylvania cases the courts held that the means of paying the loans was by the regular payment of the stock installments, and interest equal to the advantage gained over others by the advance.[1] The fallacy of this doctrine is obvious from the fact that the borrower, standing as a member, is not merged in his superadded character of debtor, and that as a member he is not entitled to an account of profits made by the association upon its contributions before the period of its termination, whilst the settlement of his liabilities as a borrower is also referred to the winding up of the mutual scheme. It has, therefore, become a well-recognized doctrine that payments of dues upon stock are not payments to the mortgage debt, and do not, *ipso facto*, work an extinguishment of so much of the mortgage, and hence they are not to be regarded as partial payments. "In the cases of Kumfert v. Guttenberg Building Association, and Hughes' Ap-

[1] Kupfert v. The Guttenberg Building Association, 30 Pa. St. 465; Hughes' Appeal, 30 Pa. St. 471; Building Association v. McKnight, 3 Phil. 209.

peal, which were questions of distribution after a sheriff's sale of the property mortgaged, it was held that payments on account of the stock were to be regarded as payments on account of the loan. If this be so, it is argued, and with great force, that after the judgment upon the *scire facias*, it must be taken as settled that the plaintiff has already had a credit upon his mortgage for the value of the stock, so far as it was made up by payments of installments. The doctrine of those cases was perhaps in advance of the general understanding. It was considered to be necessary in order to protect the borrowing community from the oppression and hardships to which they are so often subjected by the money lending associations, now so numerous and so unlike in character to what was supposed when the legislature provided for their incorporation. It is well known that the original design of the legislature was to encourage the erection of buildings. The motive for the grant of the franchise was public improvement. But the practical working of the associations formed under the law has not been what was anticipated. Though called "building societies," they are, in truth, only agencies by which a greater than legal interest is obtained from the necessitous and unwary. It was the knowledge of this fact which led to the effort made in the cases cited to afford some protection to the borrower. What was then said, however, is not to be regarded as laying down the rule that payment of dues on stock, *ipso facto*, works an extinguishment of so much of the mortgage. The debtor may so apply it, but the payment itself is not an application of the money to the reduction of the mortgage. To hold that it is would be giving to the association additional facilities for obtaining excessive interest. The debtor is not compelled to give up his stock whenever suit may be brought upon his bond or mortgage. Such would, however, be the necessity of his case, if the law applied, against his consent, the installments paid by him upon his stock, to the discharge of his indebtedness for the money borrowed."[2] While it is true that payments of dividends and stock payments is not a payment on the mortgage indebtedness, yet, when the association, because of insolvency, is unable to carry out its part of the contract mortgage is not enforced in terms, but is as it were rescinded, and courts seem to do equity between members and association, as between the borrower and lender, considering mortgage as giving an equitable lien on the mortgaged property. In a recent case decided by the county court of Penn., the court seemed to hold squarely on that point. In that case the defendant was a borrowing member, with dues and interest paid up. Association made an assignment for benefit of creditors. Defendant received $800 on five shares, giving bond and mortgage for $1,000, and assigning his five shares as further security. "These facts show that the defendant is in a situation for which the statutes do not provide. He is not a defaulting borrower, because he has paid his dues and interest regularly and has always been ready and willing to continue payment. He is not a withdrawing stockholder; neither is he a borrower who desires to pay his loan. For all these cases rules may be found in either the Acts of Assembly, or in the decisions of courts thereupon; but for the case of a person from whom the association withdraws, and with whom the association is in default, no provision seems to have been made. How much he ought to repay upon his mortgage is the question before us, and, in the absence of statute or decision, we are at liberty to decide as seems just to all interests concerned. We think the obvious answer to the question is the true answer. The defendant is not in default nor in any other situation for which the legislature has made provision. He cannot be regarded as a person who has borrowed $800 and because of his own default is now bound by statute to pay $1,000, nor as stockholder, who desired to withdraw because the value of his stock cannot be ascertained until the creditors of the association have been paid in full; nor is he borrower desiring to repay his loan because he cannot be paid the withdrawing value of the shares pledged for his loan; but he must be regarded simply as a person who has borrowed so many dollars of the fund of the association upon a peculiar contract which

[2] North America Building Association v. Sutton, 35 Pa. St. 463; Spring Garden Association v. Tradesman's Loan Association, 46 Pa. St. 493; Germania Building Association v. Neill, 93 Pa. St. 322; Early and Lane's Appeal, 89 Pa. St. 411; 2 Am. & Eng. Enc. of

through no fault of his own cannot now be carried out, and who ought, therefore, simply to return the money with legal interest thereon. After this is done he is entitled to reassignment of his shares of stock upon which he may realize something after creditors have been fully paid, just as the other non-borrowing stockholders may—all realizing alike on their investment in the building association. In our opinion nothing else can be done. The interdependent series of contracts which the association has made cannot be fulfilled; weekly payments during a period of several years have become impossible; outside creditors exist and are entitled to be paid speedily, and the whole scheme must therefore be given up. The contracts must be treated as rescinded and the parties must be put as nearly as possible to their former position. This is accomplished by the method suggested, and we will enforce it in the present case by directing judgment to be entered in favor of the plaintiff for the sum of $788.08, being $800, the amount of money actually received by the defendant with $149.83 interest from November 10, 1891, to December 20, 1894, less $161.25, the interest already paid."[3] The insolvency of the association puts an end to its operation as a building association; to a certain extent it also ends the contract between it and its members respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors and between the members themselves. As regards the latter, care must be taken to adjust the burdens equally, and not to throw upon either borrowers or non-borrowers more than their respective shares. That result may be reached by requiring the borrower to repay what he actually received with interest. He would then be entitled, after the debts of the corporation are paid, to a *pro-rata* dividend with the non-borrower for what he has paid upon his stock. He will then be obliged to bear his proper share of the losses. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses and throw them wholly upon the non-borrower.[4] As members of the corporation all stockholders are, to one another, liable to bear their respective proportion of the expenses of the concern. Being entitled with all others in the direct *ratio* of his interest in the society—to share in the common gains of the enterprise, in the same proportion in which he expects to profit—is he liable to contribute to the losses and expenses incident to its management?[5] This liability is confined, as in other corporations, to the extent of the member's stock interest, *i. e.*, the par value of the stock standing in his name, together with unpaid subscriptions thereon.[6] But, as far as it extends, he cannot evade such liability by a transfer of his stock without the consent of the corporation.[7] And this liability is not in any way affected by the fact that the member has become a borrower, so long as, being such, he still continues in membership.[8]

In an Indiana case, it appeared that shortly prior to the end of the corporate existence of the association, it was ascertained that its entire assets accumulated from all sources would not be sufficient to pay all the debts, claims and losses, and in order to effectuate this the board of directors convened in special session and adopted the following resolution, levying an assessment on each share of stock: "Resolved, that the secretary of this association levy an assessment of 22 51-100 per cent. on each dollar of stock outstanding for the purpose of paying all members equally on their stock on the expiration of the association." "Resolved, that the secretary of this association is hereby ordered to notify

Law (1st Ed.), 639, and cases cited; Price v. Kendall (Tex.), 36 S. W. Rep. 810; Post v. Mechanics' Building and Loan Association (Tenn.), 37 S. W. Rep. 216. Harris's Appeal, 18 W. N. C. (Pa.) 14, 4 Am. & Eng. Enc. of Law (2d Ed.), 1058; Eversmann v. Schmitt (Ohio), 29 L. R. A. 184.

[3] State Saving and Loan Association v. Carroll, 15 Pa. Co. Ct. Rep. 522.

[4] Strohen v. Franklin Saving and Loan Association, 115 Pa. St. 237, 8 Atl. Rep. 843, 6 Cent. Rep. 739, approved in 69 N. W. Rep. 890; Leahy v. National Bldg. & Loan Assoc., 76 N. W. Rep. 628 (decided Oct. 11, 1898); End. Bldg. Assocs., § 523.

[5] McGrath v. Hamilton Saving and Loan Association, 44 Pa. St. 383; 2 Am. & Eng. Enc. of Law (1st Ed.), 622; Broadwell v. Interocean Homestead, etc. Assoc., 161 Ill. 327; 4 Am. & Eng. Enc. of Law (2d Ed.), 1035; Leahy v. Natl. Bldg. & Loan Assoc., 76 N. W. Rep. 628; End. Bldg. Assocs., §§ 77-79, 518.

[6] State Saving Association v. Kellogg, 63 Mo. 540.

[7] Everhart v. West Chester & Philadelphia R. R. Co., 28 Pa. St. 339; 2 Am. & Eng. Enc. of Law (1st Ed.), 622.

[8] 2 Am. & Eng. Enc. of Law (1st Ed.), 623; Patterson v. Albany Building and Loan Association, 63 Ga. 378; Seibel v. Victoria Building Association, 43 Ohio St. 371; Callahan's Appeal, 124 Pa. St. 38, 16 Atl. Rep. 683; 4 Am. & Eng. Enc. Law (2d Ed.), 1035.

each stockholder of the assessment, and said notice shall contain the amount due from each." The assessment against appellant upon his stock, made by virtue of the aforesaid resolution, amounted to $450.20; this he refused to pay, which refusal, upon his part, resulted in this action being instituted upon the note and mortgage. The controlling question in this case to be determined is this: Was appellee authorized to make the assessment call in controversy upon appellant's stock, and, upon his refusal or failure to pay the same, proceed to collect it by suit upon the note and mortgage? The contentions of the appellant upon this proposition are: First. That the debt, embraced in the note and secured by appellant's mortgage, was wholly paid by him before the commencement of the action, inasmuch as appellee's by-laws provided that all loans should become due in eight years, and at the end of that time, the note and stock should be set off against each other. Second. That the statute, section 3419, R. S. 1881, limits assessments to twenty-five cents per month, to be collected with other installments for expenses. And inasmuch as appellee had not accepted the provisions of the Act of 1885 (Acts 1885, p. 81) as provided by section 15, of said act (4458 R. S. 1894), it could not be held to be authorized under this act to make assessment to pay losses. Third. That the note in suit does not include assessments to pay losses, debts and expenses. While on the other hand appellee contended that association had full power and authority to make the assessment upon its stockholders for the purpose of closing up its business, paying its debts and losses, and adjusting matters among its members, in order that the "borrowers" and "non-borrowers," at the winding up of the corporation, might stand on an equality with each other. In discussing these matters, the court said: "The determination of these important questions, which are new so far as the decisions of this court are concerned, require a careful examination and consideration of the statutes pertaining to building and loan associations. In our opinion, neither of the contentions of the learned counsel of the appellant can be sustained. It is evident, as a legal proposition, when the appellant became a borrowing member of the corporation, he did so, subject to its by-laws, rules and regulations, and also the express and implied powers with which it was invested by law." Section 30 of appellee's by-laws, among other things, provides: "That the note and mortgage given by members who receive loans must secure the repayment thereof, interest and premium thereon, with all weekly dues, together with all fines and assessments on stock held by the members, etc." It would seem that this by-law contemplated that assessments upon stock might, and would be made, and, therefore, provided that payment of the same should be covered by the borrower's note and secured by his mortgage." By an examination of the several sections of the Act of 1875, under which appellee was organized, it will be found that section 4 (being section 3410 R. S. 1881) provides: "That every share of stock shall be subject to a lien for the payment of unpaid installments and other charges incurred therein, under the provision of the constitution and by-laws." Again, in section 3412, R. S. 1881, it was stipulated that "good and ample real estate or personal security, as prescribed by the by-laws of the corporation, shall be given by the borrower to secure the repayment of the loan with interest, and also for the payment of the dues, fines and assessments that may be assessed on his share of stock upon which the loan is made." Section 3419 reads as follows: "All such associations shall have power to assess, in addition to * * * section 4 of this act (section 3410) * * * and shall have the power to provide in their by-laws for the assessments of fines and penalties * * * interest, installments and assessments." "It is manifest, we think, that, giving a reasonable interpretation to these several sections, we must conclude that assessments, such as the one in question, were intended to be, and are authorized to be levied by these corporations upon the unpaid capital stock of their members. It follows from the conclusion reached, and it is so adjudged, that the appellee was authorized under the law to make the assessment for the purpose aforesaid, and that appellant was liable upon his note and mortgage for the payment of the same."[9] Again in an

[9] Woolford v. Citizens' Building, Loan and Saving Association, 140 Ind. 662; Willis v. Citizens' Building, Loan and Saving Association, 140 Ind. 699; Wagner v. Citizens' Building, Loan and Saving Association, 140 Ind. 700; Strohen v. Franklin Saving and Loan Association, 115 Pa. St. 273; Callahan's Appeal, 124

Ohio case decided in 1895, Minshall, C. J. says: "Mutuality is the essential feature of a building association. Each shareholder, whether a borrower or non-borrower, participates alike in the earnings of the association and alike assists in bearing the burden of losses sustained. Losses are incident to the most careful management of men. They cannot be wholly avoided, though it is worthy of note that the smallest of the losses in the management of building associations, compared with that of other institutions, is remarkable. Still agents may prove unfaithful and bad loans be made. When this happens, the mutual character of the association prescribed that the burden must be sustained by the stockholders according to the amount of their stock, for he who participates in the benefit of a business must assist in bearing the burden. As before observed, borrower and non-borrower participates alike in the earnings of a building association. The difference between them is simply in the time at which each class is paid the par value of his shares. A borrower before his stock is paid up received from the association the par value of his shares, in the nature of an advance loan; * * * he agrees to keep up and pay out his stock as if he were a non-borrower in consideration of the amount being advanced to him before that time. And the exact test of his right to call for a cancellation of the mortgage given to secure his obligations as a borrower is the inquiry whether he would have been entitled to receive from the association the par value of the shares on which the loan was made had he not become a borrower.[10] The dissolution of the building association necessarily puts an end, not only to its capacity to receive, from time to time, his small payments, but also to the possibility of their being turned to account, for his benefit, by means of the system of investment and reinvestment peculiar to the building association scheme. The main feature which was made his undertaking bearable, and in reliance upon which he has been induced to assume its obligations, is thus taken away, and it follows as an inevitable consequence that he cannot be held to its precise terms. His duty to make regular stock payments, a duty incident to membership only, ceases, for the stock itself destroyed, there being no longer a corporation as whose stock it can figure, and the membership dies with the corporation. So far as the mortgage was given to secure the performance of this membership duty, the obligation is abrogated by the destruction of the stocks and the society. In endeavoring to formulate a rule which shall do exact justice to all the parties, the courts have not arrived at altogether uniform results. On one point there seems to be a general consensus, although the distinct enunciation of the principle is only of very recent date. It is this, that upon premature dissolution of the association, the advanced members may be compelled to pay forthwith the balances due from them on their securities, although the latter be given in terms only for the payment of installments.[11] Just how those balances are to be made up, however, is a question upon which there has been a diversity of opinion. In one class of decisions it has been declared that the borrower is to be charged only with the amount he has actually received with legal interest, upon the principle of partial payments.[12]

The conclusion reached by the above cases have been in part rejected by the courts of other States. In Pennsylvania, where the building association had become insolvent and gone into the hands of a receiver, who sued a borrowing member upon his mortgage, it was said: "It is clear that the business of the association ceased with the appointment of a receiver. Nothing remains but liquidation. The receiver had no authority to collect dues maturing after his appointment, for that would be to continue the association instead of winding it up. Under such circumstances, was the company entitled to recover in this suit the full amount of the mortgage with interest? If so, the defendant will be placed in a much worse position than the non-borrowing stockholder. The latter loses only what he has paid in on his stock, while the defendant loses, in addition, the $2,268 which he bid as the premium. In view of the failure of the company, the consideration of in-

Pa. St. 138; People v. Lowe, 117 N. Y. 175; Knutson v. Northwestern Loan and Building Association, 69 N. W. Rep. 889.

[10] Eversmann v. Schmitt, 52 Ohio St. 174, 41 N. E. Rep. 139, 29 L. R. A. 184.

[11] Kemp v. Wright, 2 Ch. 462; Brownlie v. Russell, 8 App. Cas. 235.

[12] Cook v. Kent, 105 Mass. 246; Windsor & Applegrath v. Bandel, 40 Md. 250. Also 14 Am. Law Reg. (N. S.), 250; 48 Ga. 445; 48 Md. 448; 51 Md. 198; 58 Md. 279; 64 Md. 338.

ducement for giving this large premium has failed, or at least has failed in part. That consideration was the mode of payment, being in small sums monthly, and his participation in the profits resulting from premiums, fines and other sources. It is plain to see that, if other members purchased loans at a premium, be the same large or small, he participates in those profits, in the event of the solvency of the company and its winding up in the usual manner, while he is deprived of such participation by insolvency and a failure to carry out the object of its formation. * * * The insolvency of the company, as before observed, puts an end to its operations as a building association; to a certain extent it also ends the contract between it and its members respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw upon either borrowers or non-borrowers more than their respective share. That result may be reached by requiring the borrower to repay what he actually received with interest. He would then be entitled, after the debts of the corporation are paid, to a *pro-rata* dividend with the non-borrower for what he has paid upon his stock. He will thus be obliged to pay his proper share of the losses. To allow him credit upon his mortgage for his payments on his stock would enable him to escape responsibility for his share of the losses, and throw them wholly upon the non-borrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner. In our view of the case, the plaintiff (building association) was entitled to judgment, but not for the amount for which it was entered, the full face of the mortgage, including premium bid, and interest upon the whole. The damages should be assessed by charging the defendant with the sum actually received on his mortgage, with interest for the same, and crediting him with all actual payments of interest. But his payments upon his stock are not to be credited on the mortgage as payments of either principal or interest."[13] The courts of Tennessee adopted this resolution. There the association was insolvent, * * * not able to pay its debts on the amounts paid in by its stockholders of all classes in full, but that a loss in a final adjustment of its affairs will have to fall upon its stockholders, who will receive something upon their stock, but the exact amount of loss cannot yet be definitely ascertained." Receiver appointed. Court, after discussing both theories, adopts the Pennsylvania rule as the best in principle, and says: "Charge defendant with money actually received by him, treating same as due and drawing interest from time received, and credit him thereof by payments of interest and premium when made. Ascertain balance due, making calculation upon principle of partial payments, and give recovery for such balance. Let amount paid by defendant as dues on stock stand to his credit on the books of the corporation until time for final adjustment, when he and other stockholders, borrowers and non-borrowers will be paid, *pro-rata*, from the fund for ultimate distribution. Thus the loss will be apportioned equally."[14] A rule differing from either of the above was reached by the United States Circuit Court of the Northern District of Illinois. In that case, Grosscup, D. J., says: "The question * * * reduces itself to one of simple equity and fair play. The inability of the association to proceed to its expected termination by reason of the impairment of its collectible loans is attributed alike to each stockholder. The officers of the association are their agents, and the result of their investments are alike the fortune or misfortune of each stockholder, whether it be borrower or non-borrower. When a condition thus brought about justifies a court of equity in peremptorily terminating the career of the association, the adjustment should be made upon the line of what would take place if the association lived out its life as possible. I can think of no fairer rule than to regard the normal life of the association as eight years, and to look upon each year short of that period as an aliquot portion thereof. This would give the borrower credit for such premium as the number of years, or fractional

[13] Strohen v. Franklin Saving and Loan Association, 115 Pa. St. 273.

[14] Rogers v. Hargo, 92 Tenn. 35, 20 S. W. Rep. 430; Post v. Mechanics' Building and Loan Association (Tenn.), 37 S. W. Rep. 216; Price v. Kendall (Tex.) (1896), 36 S. W. Rep. 810; Rogers v. Raines (Ky.) (1896), 38 S. W. Rep. 483.

parts thereof, unlived by the association, bear to the whole period of its normal life of eight years. To that extent the premium is unearned; for the period already past it has been earned. It is true that the borrower might not have bid the premium if he had foreseen the premature death of the association; but neither would his fellow stockholders, with like knowledge, have contributed their installments. The misfortune of the one is not greater than that of the other. If the borrower were to be credited with the entire premium, the taking of possession of the assets by a court of equity would immediately reduce the already impaired assets by the amount of the aggregate premiums. It might easily be that the intervention of equity near the close of the eight years would, under the circumstances, be a positive boon to the borrower, by incidentally deducting from the loan a large percentage of the principal. The temptation and uncertainty thus introduced ought, if possible, to be averted."[15] After considering all these different rules, I think that the best rule in regard to the distribution of the assets of insolvent associations, in so far as it relates to borrowing members, to be that the borrowing stockholder will be charged with the money actually received by him, with interest from date of receipt. He is credited with all payments of interest and premiums as of dates when made. He is not allowed credit for amounts paid as dues on his stock. After all liabilities of the association are paid, the remaining fund is to be distributed, *pro-rata*, among stockholders, whether borrowers or not, upon the basis of the amounts paid by them, respectively, as dues upon the stock.[16]

Indianapolis, Ind. GEO. O. BUCHHOLZ.

[15] Towle v. American Building, Loan and Investment Co., 81 Fed. Rep. 446.

[16] This is in accord with the rule as laid down in Strohen v. Franklin Saving and Loan Association, 115 Pa. St. 273.

NEGLIGENCE—PLEADING.

CHATTANOOGA COTTON-OIL CO. v. SHAMBLIN.

Supreme Court of Tennessee, October 1, 1898.

A cause of action is not stated by a complaint merely alleging that on a certain day defendant "wrongfully and negligently killed" plaintiff's intestate.

BEARD, J.: This action was instituted to recover damages for personal injuries received by the intestate of the defendant in error, while engaged in the service of the plaintiff in error, from the effect of which, it is alleged, he subsequently died. Upon an issue raised by the plea of not guilty, the case was heard, the trial resulting in a verdict in favor of the plaintiff below for $5,000. The record is before us on assignments of error to the action of the lower court. The declaration filed in the cause is in words and figures following, viz.: "The plaintiff, G. W. Shamblin, administrator of the estate of David L. Shamblin, deceased, sues the defendant, Chattanooga Cotton-Oil Company, which is in court by summons, for twenty-five thousand dollars ($25,000) damages, for that heretofore, to-wit, on the——day of January, 1896, the defendant wrongfully and negligently killed David L. Shamblin, who left next of kin as follows: A father, G. W. Shamblin; mother, Sarah J. Shamblin; four brothers, John, Joe, Julius, and G. B. Shamblin; four sisters, Maggie, Mary, Annie, and Lucy Shamblin,—for whose use plaintiff brings this suit,—to their damages as aforesaid. Plaintiff herewith exhibits his letters of administration, and demands a jury to try the cause." To this declaration a demurrer was filed, raising the objection that it did not allege a cause of action against the defendant, in that it failed to state any facts or circumstances to put the defendant on notice of the negligence which was complained of, and which the company was required to defend. "Pleading," says Mr. Chitty, "is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense. It is the formal mode of alleging that n the record which would be the support of the action, or the defense of the party in evidence." Continuing, this author adopts and embodies in his text the statement of Mr. Justice Buller that i"one of the first principles of pleading" is "that there is only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and of apprising the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." 1 Chit. Pl. *213. Again, under the caption of the "Modes of Stating Facts," he emphasizes it as the "principal rule" of pleading that the facts "must be set forth with certainty, by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them; by the jury, who are to ascertain the truth of the allegations; and by the court, who are [?] to give judgment." *Id.* *233. The absolute necessity of this rule and for its enforcement has been recognized by many courts. In McCune v. Gas Co., 30 Conn. 521, the plaintiff, in his declaration, alleged that the defendant company was organized to make and sell illuminating gas,

with its pipes laid in the streets of the city for the purpose of enabling it to convey gas to its customers; that plaintiff's rooms were supplied with pipes and fixtures, which were connected with the mains of the defendant corporation, and that for a period of time it had supplied him, and that he still desired to continue the use of its gas, and was willing to pay for the same, and that it was the duty of the defendant to supply him, but that in wanton disregard of his duty it declined to do so. With regard to this declaration the court said: "No contract for the supply of gas for an indefinite period is alleged to have been made by the defendant, nor, in fact, any contract at all. The entire foundation of the plaintiff's claim, as it is set out in his declaration, rests upon the supposed legal duty or obligation, independent of any contract, to continue the supply. But no facts are stated from which such duty or obligation arises, and the allegation of a duty or liability is of no avail, and will not help the declaration, unless the facts necessary to raise it are stated. It is but the statement of a legal inference, never traversable, and of no avail in pleadings." Subsequently the same court, in an action for the recovery of damages for a personal injury resulting in death, reannounced this as an essential rule to good pleading. Hewison v. City of New Haven, 34 Conn. 136. In Railroad Co. v. Wilson, 31 Ohio St. 557, and Morrison v. Insurance Co., 69 Tex. 359, 6 S. W. Rep. 605, this rule is recognized and applied. In Navigation Co. v. Dandrige, 8 Gill & J. 248, in arresting a judgment rendered upon a declaration, full in everyother respect, which failed to allege a consideration for the defendant's promise, the court said: "The object of all pleadings is that the parties litigant may be mutually apprised of the matters in controversy between them. The declaration should substantially present the facts necessary to constitute the plaintiff's right of action, that the defendant, being thereby forewarned of the nature of the proof to be preferred against him, may if necessary, be prepared to contradict, explain, or avoid it." Madden v. Railway Co., 35 S. Car. 381, 14 S. E. Rep. 713, was an action to recover for personal injuries. With regard to the pleadings in that case it was said by the court that: "Negligence being a mixed question of law and fact, it is not sufficient to allege in general terms that an injury has been sustained by reason of the negligence of the defendant, but the plaintiff must go on, and allege the facts constituting such negligence." In Conley v. Railroad Co., 109 N. Car. 692, 14 S. E. Rep. 303, it was held that a complaint averring that "the plaintiff was by the wrongful act, neglect, and default of the defendant slain and killed," without more, was bad pleading; and in Railroad Co. v. Harwood, 90 Ill. 425, there was the same holding as to the averment of the declaration that a railway company "carelessly, etc., managed its engine and cars," so as to inflict injury, unsupported as it was by any statement showing in what the carelessness, etc., consisted; while in Railroad Co. v. Whittington, 30 Grat. 805, it was ruled on demurrer that a declaration alleging generally, without stating specific acts, that the plaintiff was injured in consequence of the negligence of the defendant in operating its road and cars, etc., was too general. In Waldhier v. Railroad Co., 71 Mo. 514, a petition by an employee seeking a recovery for an injury, and alleging, without stating specific facts, that the injury was the result of the negligence of the railroad company in using defective machinery and in running and managing its cars, was held fatally defective for uncertainty; and the same rule was applied to an answer to a complaint in Harrison v. Railroad Co., 74 Mo. 364. In Searle v. Railroad Co., 32 W. Va. 370, 9 S. E. Rep. 248, the rule requiring certainty in the statement of the facts constituting the cause of action is recognized as a correct one, but, as it had been modified by statute in that State, less fullness of detail was required than in other States, where there was no such statutory modification.

The cases that have been here collected were determined in States some of which adhere in a general way to the requirements of common-law pleading, while in others the code practice prevailed. With respect to the latter, Mr. Lawson, in his Rights, Remedies & Practice, volume 7, § 3462, on the authority of many cited cases, says that "it is a *sine qua non* under code pleading that the complaint or petition must contain a statement of the facts constituting the cause of action. It is the ultimate facts which must be stated, not the evidence of facts, or prohibitive facts, or the legal conclusions based on the facts." The rule of the common law, as has been seen, was not less strict. Under both systems this declaration is fatally defective. It must be conceded that some of the courts of this country at times, and other courts possibly all the time, have permitted plaintiffs to maintain actions for personal torts upon a simple statement that they were the result of the negligence of the defendants, but we think a majority of the courts and the best-considered cases recognize it as a requirement of good pleading that the facts constituting the negligence shall be set out, and especially in such a case as the present. As is well stated in the very valuable Encyclopedia of Pleading & Practice, volume 5, p. 861, it is necessary that "all the circumstances essential to support an action for death by wrongful act must be alleged or appear in substance on the face of the declaration or complaint." Coming now to this State, we find that Shannon's Code, § 4602, provides that "all pleadings shall state only material facts without argument or inference, as briefly as is consistent with presenting the matter in issue in an intelligible form." In construing the sections of the code on the general subject of pleading, including that just quoted, in Evans v. Thompson, 12 Heisk. 536, this court said: "These wise and wholesome provisions are based on the sound principle that the rights of litigants are not

to be sacrificed to mere technical verbiage, * * * but are to be ascertained by the courts upon the statement of material facts in an intelligible form," etc. In Cherry v. Hardin, 4 Heisk. 202, this court had occasion to deal with section 4438 of Shannon's Code (section 2747 of the old code), which is in these words: "All wrongs and injuries to the property and person * * * may be redressed by an action on the facts of the case," and construed it to mean that "matter, without multiplicity of words, is all that is required in notifying the adversary of which he is to answer or defend." We are entirely satisfied that the declaration in question does not meet the requirements of these sections as they were construed in these cases. It is insisted, though, that it is good under the authority of Railroad Co. v. Pratt, 85 Tenn. 9, 1 S. W. Rep. 618, and Coal Co. v. Daniel (Tenn. Sup.), 42 S. W. Rep. 1062. This is error. Neither of these cases involved a question of good pleading. In the first, the declaration set out the time and place of the injury, as well as the circumstances under which it occurred, and then alleged that the defendant "wrongfully and negligently ran its engines and cars * * * upon the plaintiff." Under this declaration, evidence was admitted, over the objection of the defendant, tending to show that it was negligent in failing to observe the statutory precautions. It was insisted here, as in the court below, that this was error, as the declaration stated only a case of common-law negligence. This was the sole question in that case, and this court, speaking through the present chief justice, only reannounced the oft-repeated doctrine that our statutes prescribing the duties of railroads in order to avoid accidents were declaratory of the common law, and it was, therefore, held that this evidence was competent. No objection was made in either court to the declaration on the ground of insufficiency or vagueness, and none was considered. In the second, the question was, can a plaintiff, in his declaration, set out certain definite acts of negligence, and allege them as the occasion of his injury, and recover upon evidence of other and independent negligent acts? and this court, through Justice McAlister, said he could not. To this point was the argument of the opinion directed, and to it the references and the statements are to be confined. After a careful examination of the authorities, and especially our own statutes and decisions, we are satisfied that the circuit judge was in error in overruling the demurrer to the declaration in this case. This conclusion renders it unnecessary for us to consider other assignments of error. The judgment is, therefore, reversed, and the cause is dismissed.

NOTE.—Among the rules of pleading which remain unchanged by the introduction of the Code, are the requirements that pleadings must be certain, and that the evidence must agree with the pleadings. 3 Lawson's Rights, Remedies & Practice, sec. 1216. The plaintiff may not state one act of negligence in his declaration and recover on proof of another act. Chicago, etc. Railroad Co. v. Bell, 112 Ill. 360. A declaration for negligence is not supported by proof of negligent acts not specifically set out. Wabash, etc. Railroad Co. v. Coble, 113 Ill. 115. It is sufficient to allege that a duty existed upon the part of the defendant, and that he violated such duty, but the facts must be stated showing the legal liability. Unless the duty results in all cases from the stated facts the declaration will be bad. Toledo, etc. R. Co. v. Weaver, 34 Ind. 298; Pittsburg, etc. R. Co. v. Troxell, 57 Ind. 246; Brown v. Mallett, 5 Com. B. 599; Buffalo v. Holloway 7 N. Y. 493, 57 Am. Dec. 550. But unless it is sough to recover such damages it is not necessary in an action for personal injuries that the injuries received by the plaintiff should be particularly described in the declaration. It is enough if it is shown that the plaintiff received a bodily injury. Corey v. Bath, 35 N. H. 530; Brown v. Byroads, 47 Ind. 435. Negligence on the part of the defendant is the gist of the action and must be charged in the plaintiff's petition. Wright v. Railroad Co., 18 Ind. 168; Toledo, etc. R. Co. v. Edison, 51 Ind. 67; Quick v. Railroad Co., 31 Mo. 399; Brown v. Railroad Co., 33 Mo. 309; Dyer v. Railroad Co., 34 Mo. 127. It is not, however, absolutely necessary that it should be averred in terms if such facts are stated as will raise a presumption of negligence. Quick v. Railroad Co., *supra*; Brown v. Railroad Co., *supra*; Dyer v. Railroad Co., *supra*; Burdick v. Worrall, 4 Barb. 596. It is not necessary to set out the facts constituting the negligence complained of, an allegation specifying the act constituting the injury and alleging that it was negligently and carelessly done, is sufficient. St. Louis, etc. R. Co. v. Mathias, 50 Ind. 66; Ohio, etc. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Clark v. Railroad Co., 15 Fed. Rep. 588; Rowland v. Murphy, 66 Tex. 534; Mack v. Railroad Co., 77 Mo. 232; Schneider v. Railroad Co., 75 Mo. 295. But the act, the negligent doing of which caused the injury, must be stated. A bare allegation that the party was negligent is too general to support any evidence. Jeff., etc. R. Co. v. Dunlap, 29 Ind. 426; Kennedy v. Morgan, 57 Vt. 46. For instance, the full particulars of the derailment of defendant's train on which plaintiff founds his action for personal injuries, need not be set forth in the complaint. Louisville & Nashville R. Co. v. Jones, 83 Ala. 376.

Recent Decisions as to Averments of Negligence in Action for Personal Injuries.—The allegation in a complaint that an act was negligently done is sufficient, without setting out the details of the negligence. Rogers v. Truesdale (Minn.), 58 N. W. Rep. 688. In an action for negligence, where a legal duty is shown, and its breach, a general allegation that the acts done or omitted were so done or omitted negligently, is sufficient to sustain the charge. Louisville, E. & St. L. Consolidated R. Co. v. Hicks (Ind. App.), 37 N. E. Rep. 43. An allegation in a complaint that one of defendant's trains negligently struck cars on a side track was sufficient, without showing particularly how it negligently struck them. Galveston, H. & S. A. Ry. Co. v. Croskell (Tex. Civ. App.), 25 S. W. Rep. 486. A general averment of negligence on the part of a street railway company in running its car is sufficient to include negligence in sounding the gong on approaching a frightened team. Benjamin v. Holyoke St. Ry. Co. (Mass.), 160 Mass. 3, 35 N. E. Rep. 95. A complaint against a railroad company for negligence is sufficient which alleges that plaintiff's mule was frightened at the unnecessary noise of defendant's train near a highway, and "owing to the negligence of the defendant's employees running and managing

said cars." Oxford Lake Line v. Steadham (Ala.), 13 South. Rep. 553. A complaint charging negligence whereby a traveler on the highway was killed at a railroad crossing, but which fails to state any particular act or omission of defendant constituting negligence, is demurrable. Wilson v. New York, N. H. & H. R. Co. (R. I.), 29 Atl. Rep. 258. In an action to recover for damages caused by negligence, it is sufficient to state that the act was negligently done, without alleging what particular acts constituted the negligence. Louisville, N. A. & C. Ry. Co. v. Berkey (Ind. Sup.), 35 N. E. Rep. 3. A complaint sufficiently alleged the negligence of defendant, when it stated that he left the body of his dead cow in a public highway, and that, while plaintiff was exercising proper care in attempting to drive past the body, his horses were frightened thereat, and ran away and injured him. Hindman v. Timme (Ind. App.), 35 N. E. Rep. 1046. A complaint alleging that in the car in which plaintiff was riding, on the wall over the seat given him, defendant railroad company had negligently hung, placed, or affixed a bottle containing a fluid, and that the bottle was broken or exploded, and the contents negligently spilled on plaintiff's clothes and person, alleges with sufficient certainty the negligence of defendant. Alabama, G. S. R. Co. v. Collier (Ala.), 14 South. Rep. 327. In an action for injuries caused by defendant's alleged negligence, it is sufficient that the complaint allege generally negligence on defendant's part. House v. Meyer (Cal.), 100 Cal. 592, 35 Pac. Rep. 308. A complaint in a personal injury suit which alleges that, while plaintiff was driving along the highway, defendant drove up behind at a great speed, and negligently ran into plaintiff's vehicle, is sufficiently definite as to defendant's negligence. Hanson v. Anderson (Wis.), 62 N. W. Rep. 1055. A general averment of negligence is enough, and it is enough to specify the act that caused the injury, and aver generally that it was negligently and carelessly done. Senate v. Chicago, M. & St. P. Ry. Co., 57 Mo. App. 223. One who claims damages, through negligence, must in his pleading aver the facts constituting the negligence. West Chicago St. R. Co. v. Colt, 50 Ill. App. 640. In an action for personal injuries, allegations that defendant's car on which the injured party rode had a defective brake, and that, when it approached the curve where it was derailed, defendant's servant negligently applied the full power to it, whereby it was derailed, and plaintiff was thrown through the window and injured, sufficiently specify the negligence complained of. San Antonio St. Ry. Co. v. Muth (Tex. Civ. App.), 7 Tex. Civ. App. 443, 27 S. W. Rep. 752. A complaint in an action against a street railroad company for personal injuries is not demurrable, because the only allegation as to negligence is that defendant's servant "negligently ran said car against the wagon." Citizens' St. R. Co. v. Lowe (Ind. App.), 39 N. E. Rep. 165. A complaint alleging negligence on the part of defendant or O is insufficient in not alleging facts importing defendant's liability for both its own and O's negligence. Louisville & N. R. Co. v. Bouldin (Ala.), 20 South. Rep. 325. A complaint averring generally negligence and freedom from contributory negligence is good against a demurrer, unless facts specifically set out show the averments to be untrue. Citizens' St. Ry. Co. v. Albright (Ind. App.), 42 N. E. Rep. 238. A complaint for personal injuries, which alleges that the injuries were caused by the "careless and negligent manner" in which defendant's servants managed certain appliances, is sufficient, without alleging the particular acts of such servants which constituted carelessness and negligence. Bunnell v. Berlin Iron Bridge Co., 66 Conn. 24, 33 Atl. Rep. 533. An allegation of negligence in a pleading is a mere conclusion, and the facts from which the inference of negligence arises must be pleaded. Omaha & R. V. Ry. Co. v. Wright (Neb.), 66 N. W. Rep. 842. In an action for personal injuries, the complaint is good against a demurrer, though defendant's negligence be alleged in general terms only. Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 Pac. Rep. 452. A petition for damages for injuries resulting from alleged negligence should advise the defendant of the particular negligence complained of, so that he may know against what he is called upon to defend himself, but this may be done in general terms. Benham v. Taylor, 66 Mo. App. 308. A general charge of negligence is good as a basis for proof, unless objected to in proper time before trial. Conrad v. De Montcourt (Mo. Sup.), 39 S. W. Rep. 805.

CORRESPONDENCE.

MALICIOUS INJURY TO TRESPASSER.

To the Editor of the Central Law Journal:

Having taken your journal from its start, I want to ask your aid. I wish you to put me on track of a discussion covering accidental or malicious injury to person (boy) committing a crime. The facts in the case are: A owned a store in the country. Boys (naming) broke glass out of the window and stole candy. A knew it was done by lads. He secreted himself and nearly severed the arm of the boy as he thrust it through the broken window. Under our statute the age of the boy reduced the crime below felony. Is A liable at all? GEO. D. CHAFEE.

Shelbyville, Ill.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

CALIFORNIA.....40, 46, 50, 57, 96
COLORADO.....56, 58, 91
INDIANA.....2, 24, 65
IOWA.....7, 11, 17, 23, 28, 37, 48, 49, 53, 54, 62, 71, 77, 82, 87, 93, 101, 105, 111, 112
KANSAS.....1, 3, 66, 80, 99
KENTUCKY.....26, 32, 34, 38, 61, 79, 83, 89
MASSACHUSETTS.....16, 76, 104, 110, 114
MICHIGAN.....39
MINNESOTA.....18, 19, 59, 64, 81, 98, 113
MISSOURI.....25, 85, 103, 109, 115
MONTANA.....43
NEBRASKA...4, 10, 12, 36, 41, 42, 47, 55, 63, 67, 68, 88, 92, 100, 106
NEW JERSEY.....6, 51, 75
NEW MEXICO.....8

OHIO.....13, 95, 102
OKLAHOMA.....29
OREGON.....5, 35
PENNSYLVANIA.....22, 44, 45, 72, 84, 86, 108
SOUTH DAKOTA.....14, 52, 90, 107
TENNESSEE.....9, 27, 73, 74, 94
TEXAS.....15, 30, 31, 60, 70
UNITED STATES S. C.....21, 78
UTAH.....88
WASHINGTON.....20, 69, 97

1. ACTIONS—Joinder—Law and Equity.—In this State the distinction between actions at law and suits in equity is by statute expressly abolished, and it is error for a court to compel a plaintiff to elect whether he will proceed in equity or at law.—BRAWLEY v. SMITH, Kan., 54 Pac. Rep. 804.

2. ACTIONS—Payment of Employees—Brass Checks.—Rev. St. 1894, § 7060 (Horner's Rev. St. 1897, § 5206), making it a misdemeanor to issue brass checks to an employee in payment for labor, precludes the purchaser of such checks from making them the basis of an action against the employer issuing them.—NAGLEBAUGH v. HARDER & HAFER COAL MIN. CO., Ind., 51 N. E. Rep. 427.

3. APPEAL—Case Made.—When the term of the trial judge expires before the time fixed for making and serving a case, he should settle the case the same as if his term had not expired; and, if his term expires after the time fixed for making and serving a case, yet if the time for settling a case had been fixed before the expiration of his term, which time did not expire until after the expiration of his term, he should also settle the case.—NATIONAL MORTGAGE & DEBENTURE CO. v. ST. JOHN MARSH CO., Kan., 54 Pac. Rep. 798.

4. APPEAL—Failure to File Record.—This court is without jurisdiction to hear a case on appeal, unless the transcript of the re ord is filed here within six months after the rendition of the judgment or final order sought to be reviewed.—ALBERS v. CITY OF OMAHA, Neb., 76 N. W. Rep. 911.

5. APPEAL BY TENANTS IN COMMON—Dismissal.—A decree against tenants in common rendered on a bill against all of them to quiet title to the land may be appealed from by a part of such tenants, without serving notice on the other tenants, though the decree is joint in form, since the interests of the co-tenants are distinct and several, so that the decree may be reversed as to appellants without affecting the decree in so far as it affects the non-appealing defendants.—SOUTH PORTLAND LAND CO. v. MUNGER, Oreg., 54 Pac. Rep. 815.

6. ATTORNEYS' LIENS—Equity.—Funds collected for a client may be retained by the attorney to satisfy reasonable charges for his services, and he may successfully defend a suit against him for the recovery of any part of such reasonable charge so retained.—SPARKS v. MCDONALD, N. J., 41 Atl. Rep. 869.

7. BENEFICIAL ASSOCIATIONS—Change of Beneficiary.—A by-law of a beneficial association providing the manner in which a change of beneficiary may be made cannot be taken advantage of by parties claiming the insurance.—DEPEE v. GRAND LODGE OF A. O. U. W. OF IOWA, Iowa, 76 N. W. Rep. 798.

8. BILLS AND NOTES—Accommodation.—A bond of indemnity against loss executed by a third person to an accommodation maker of the note is an equitable, and not a legal, defense, and is not properly pleadable or shown in evidence in an action at law upon the note under the common-law system, brought by the holder, who acquired the paper when it w s overdue, from the obligor.—LEE v. FIELD, N. Mex., 54 Pac. Rep. 873.

9. BILLS AND NOTES—Accommodation Indorsers—Rights Inter Se.—Two persons concurrently signing as accommodation indorsers before delivery of note are, as between themselves, equally liable thereon, the order in which their names appear being immaterial.—LOGAN v. OGDEN, Tenn., 47 S. W. Rep. 489.

10. BILLS AND NOTES—Action—Burden of Proof.—If the only defense alleged in an action on a promissory note by an indorsee thereof is a failure of consideration, the burden is upon the defendant to overcome the presumption that the note was transferred before due, for value, in the due course of business.—CROSBY v. RITCHEY, Neb., 76 N. W. Rep. 895.

11. BILLS AND NOTES—Bona Fide Holder.—The indorsee of a note, who takes the same as additional security for a pre-existing debt, is not a *bona fide* holder.—KEOKUK COUNTY STATE BANK v. HALL, Iowa, 76 N. W. Rep. 832.

12. BILLS AND NOTES—Extensions.—A note taken for a pre-existing debt, or as a renewal of another note, is not a payment or discharge of the debt, unless by express agreement it is accepted as such payment or discharge.—HARVEY v. FIRST NAT. BANK OF OMAHA, Neb., 76 N. W. Rep. 870.

13. BILLS AND NOTES—Indorsement.—A note was indorsed by the payee; also, "For collection, acct. of G, D & Co.;" also, "For collection, and return to" a certain bank. Suit was brought thereon by a member of the firm individually. Held, that the firm's indorsement did not tend to show that the firm had delivered the note to plaintiff for collection.—LEHMAN v. PRESS, Iowa, 76 N. W. Rep. 818.

14. BROKERS — Action for Commission. — Plaintiff claimed that defendant had promised to pay a certain sum on his procuring a contract for the sale of his land, and that he had done so. Defendant contended that he had so promised provided the sale as agreed on should be consummated. Held, that the question whether the contract of sale could be legally enforced was immaterial, under the issues, and an instruction that it was invalid was misleading and prejudicial.—BAIRD v. GLECKLER, S. Dak., 76 N. W. Rep. 931.

15. BROKERS—Contract.—A contract to perfect a title to lands, and to sell them at an agreed minimum price, and to receive as compensation one-third the proceeds, and expressly providing that no interest or title in the lands shall thereby pass, does not create any lien on or title in such land.—GIRAND v. BARNARD, Tex., 47 S. W. Rep. 482.

16. CARRIERS—Passengers—Mixed Trains.—A passenger who knowingly rides on a train composed of freight and passenger cars, regularly run on a branch road, where no other train is required by the traffic, assumes additional risks incident thereto.—OLDS v. NEW YORK, N. H. & H. R. Co., Mass., 51 N. E. Rep. 450.

17. CERTIORARI—Right to Maintain.—A disbarred attorney, who was a party to a suit, not individually, but merely as trustee, cannot prosecute *certiorari* to review the refusal of the trial court to permit him to appear in and prosecute the suit, since he is without interest individually, save as attorney.—WILSON v. REMLEY, Iowa, 76 N. W. Rep. 843.

18. CHATTEL MORTGAGE—Possession by Mortgagee.—If a mortgagee or pledgee takes possession of the mortgaged or pledged chattels before any other lien attaches thereto, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, although the mortgage was not filed nor the chattels delivered when the contract of pledge was made.—PROUTY v. BARLOW, Minn., 76 N. W. Rep. 946.

19. CHATTEL MORTGAGES—Sale by Mortgagor.—Where the mortgagor of chattels, without the knowledge or consent of the mortgagee, sells the mortgaged property, but the purchase money remains unpaid, the mortgagee may waive the tort, and sue the purchaser for the purchase money.—MCARTHUR v. MURPHY, Minn., 76 N. W. Rep. 955.

20. CONSTITUTIONAL LAW — Judicial Power.—Laws 1893, p. 226, authorizing the city council to determine the regularity, validity and correctness of an assessment, and providing for an appeal from its decision, is not unconstitutional, as conferring judicial powers on the council.—BELLINGHAM BAY IMP. CO. v. CITY OF NEW WHATCOM, Wash., 54 Pac. Rep. 774.

21. CONSTITUTIONAL LAW—Waiver of Question of Constitutionality.—A person may, by his acts or omission

to act, waive a right which he might otherwise have under the constitution of the United States.—PIERCE v. SOMERSET RY., U. S. S. C., 19 S. C. Rep. 64.

22. CONTRACT—Ratification.—Four defendants agreed each to pay one-fourth the cost of drilling a well. Afterwards one of them executed a written contract creating a joint liability, and signed the names of the other three without authority, and the work was done under the written contract. Held, that a payment of one-fourth the cost by each of said three defendants did not constitute a ratification of the written contract. —NICHOLSON v. KENNEDY, Penn., 41 Atl. Rep. 381.

23. CONTRACT FOR BUILDING — Mechanic's Lien.—A contract for the erection of a building provided for the withholding of a certain per cent. of the price until completion, and, in case of notice or any claims for mechanics' liens, the right was reserved to withhold payment until such liens or claims were paid. Held, that the owner was entitled to withhold such amount until such claims were paid, although mechanics' liens had not been secured, as provided by Acts 20th Gen. Assem. ch. 179.—INDEPENDENT SCHOOL DIST. OF FOREST HOME v. MARDIS, Iowa, 76 N. W. Rep. 794.

24. CONVERSION—Pleading—Mortgages.—In an action for conversion of mortgaged goods, a copy of the mortgage filed with the complaint as an exhibit cannot be considered in determining the sufficiency of the complaint, since the mortgage is not the foundation of the complaint, within Burns' Rev. St. 1894, § 365 (Horner's Rev. St. 1897, § 362).—DIGGS v. WAY, Ind., 51 N. E. Rep. 429.

25. CORPORATIONS—Vendor and Purchaser—Estoppel. —Certain persons who were taking steps to organize a corporation bought land, and caused it to be deeded to such contemplated corporation, and paid the price thereof. The corporation was subsequently organized. Held, that the vendor was estopped to question its corporate character and authority to take the land. —WHITE OAK GROVE BENE v. SOC. v. MURRAY, Mo., 47 S. W. Rep. 501.

26. COUNTIES — Purchase of Turnpike Roads.—Ky. Const. § 179, providing that the general assembly shall not authorize any county to become a stockholder in, or appropriate money for, any corporation, "except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads," does not prohibit the general assembly from authorizing a county to purchase a turnpike road from a corporation, as such a purchase is not only not an appropriation for a corporation, but is within the exception.—MAYESVILLE & L. TURNPIKE ROAD CO. v. WIGGINS, Ky., 47 S. W. Rep. 434.

27. COUNTY—Contract for Extra Service.—A chairman of a building committee appointed from the members of the county court to superintend improvements made upon the court house and jail is not entitled to compensation, although his services were onerous and valuable, owing to the inattention and negligence of the architect employed to oversee the work.—HOPE v. HAMILTON COUNTY, Tenn., 47 S. W. Rep. 487.

28. CREDITORS' SUITS — Fraudulent Conveyances.— Code 1873, §§ 3150-3152, authorizing a judgment creditor to bring equitable proceedings, to subject property of the debtor to payment of the judgment, and providing that persons holding property in which the judgment debtor has any interest may be made defendants, and that a lien shall thereby be created on the property of the judgment debtor in the hands of any defendant or under his control, applies to cases where the judgment debtor has possession of the property himself.—HIRSCH v. ISREAL, Iowa, 76 N. W. Rep. 811.

29. CRIMINAL EVIDENCE — Larceny — Possession of Stolen Goods.—Where a person is arrested in possession of property charged to have been stolen, the statements and declarations made by him at the time of the arrest, and constituting a part of and relating to the transaction, are part of the *res gestæ*, and are admissible in evidence in his behalf.—MITCHELL v. TERRITORY, Okla., 54 Pac. Rep. 783.

30. CRIMINAL LAW — Corpus Delicti.—Defendant was accused of stealing a mule which was missing from a pasture. Defendant was near the pasture shortly after the mule was missed, and three days later he was in a town 40 miles away, where the mule was found. Defendant's witness testified that defendant assisted in driving the mule from the pasture to said town as a hired hand. Held, that the *corpus delicti* was proved.—TIDWELL v. STATE, Tex., 47 S. W. Rep. 466.

31. CRIMINAL LAW — Homicide — Justification.—Accused testified that he caught deceased and his wife in the act of adultery, and followed them for the purpose of beating his wife, when deceased attacked him, and the killing was done in self-defense. Held, that under Pen. Code 1897, art. 672, he was entitled to an instruction that homicide committed by a husband on one taken in the act of adultery, with his wife is justifiable, although accused did not assign that as the reason for the killing.—MORRISON v. STATE, Tex., 47 S. W. Rep. 369.

32. CRIMINAL LAW — Larceny — Fixtures.—Copper boxes connected with a still by a pipe screwed into the still, though constructively a part of the freehold, are the subject of larceny.—CLEMENT v. COMMONWEALTH, Ky., 47 S. W. Rep. 450.

33. CRIMINAL LAW—Rape — Res Gestæ.—*Res gestæ* in rape cases includes the fact that a complaint was made by the injured party soon after the act. The fact that the prosecutrix complained of the outrage immediately after its commission, or delayed making such a complaint a considerable time, bears upon the credibility of her testimony.—STATE v. HALFORD, Utah, 54 Pac. Rep. 819.

34. CRIMINAL PRACTICE—False Swearing—Indictment. —An indictment, under Ky. St. § 1174, for false swearing, need not state the nature of the prosecution on the trial of which defendant swore falsely; it being sufficient to allege, in the language of the statute, that defendant was sworn by a person authorized by law to administer an oath, and that he deposed and gave evidence in a matter then judicially pending.—COPE v. COMMONWEALTH, Ky., 47 S. W. Rep. 436.

35. CRIMINAL TRIAL—Surprise.—Where a party did not move for a continuance at the time an alleged surprise occurred, but waited until after a verdict before objecting, he waived the objection.—STATE v. GARDNER, Oreg., 54 Pac. Rep. 810.

36. DECEIT—Vendor and Purchaser—Fraud.—Deceit, to ground a recovery, must relate to existing facts. But if one buy property on credit, with the intention at the time of not paying therefor, he is guilty of actionable fraud.—MCCREADY v. PHILLIPS, Neb., 76 N. W. Rep. 885.

37. DEED—Cancellation of Instruments.—Where one received a deed of another's land, and in defense to a suit for a reconveyance, on the ground that the deed was in fact a mortgage, he alleged a purchase after the original transaction was closed, he cannot avail himself of plaintiff's fraud as to creditors in making the conveyance.—GRAPES v. GRAPES, Iowa, 76 N. W. Rep. 796.

38. DESCENT AND DISTRIBUTION — Release of Interest in Estate.—The heirs of a decedent having without consideration released their interest in the estate under the mistaken belief that the estate was insolvent, which was induced by a misunderstanding of representations made to them by the widow, the release will be set aside.—WELCH v. LEWIS, Ky., 47 S. W. Rep. 454.

39. ELECTIONS — Organization of Convention.— Where there is a division of a regularly called political convention, and two rival conventions are held, neither of which has a majority of delegates admittedly entitled to seats, the courts will refuse to determine which is to be treated as the regular convention of the party; and, where different tickets are certified by each faction, the election commissioners have no authority to accept one to the exclusion of the other. —STEPHENSON v. BOARDS OF ELECTION COMRS. FOR COUNTIES OF ALGER, BARAGA, ETC., Mich., 76 N. W. Rep. 914.

40. ESTOPPEL—Trust Deed—National Banks.—Where one gave a trust deed to a bank, he was estopped to deny its power to take it.—CAMP V. LAND, Cal., 54 Pac. Rep. 839.

41. ESTOPPEL IN PAIS — Pleading.—The facts from which an estoppel *in pais* arises, to be available as such, must be pleaded; at least, where there is an opportunity to so plead.—HENDERSON V. KEUTZER, Neb., 76 N. W. Rep. 881.

42. EVIDENCE — Parol Evidence.—In an action between the parties to a valid written contract, it is a general rule of evidence that parol testimony touching an antecedent or contemporaneous agreement in relation to the same matter cannot be received to vary, add to, or subtract from the terms of the written instrument.—THOMAS V. NEBRASKA MOLINE PLOW CO., Neb , 76 N. W. Rep. 876.

43. EXPERT EVIDENCE — Mining Lease.—Under Civ. Code, §§ 2209, 2210, providing that the words of a contract are to be understood in their ordinary and popular sense, and that technical words are to be interpreted as usually understood by persons in the business to which they relate, the court may admit evidence of qualified witnesses to interpret the technical terms used in a mining lease according to the usual understanding of miners.—CAMBERS V. LOWRY, Mont., 54 Pac. Rep. 816.

44. FRAUDS, STATUTE OF—Oral Contract.—A part performance of an oral contract for the conveyance of real estate takes it out of the statute of frauds.—HANCOCK V. MELLOY, Penn., 41 Atl. Rep. 313

45. FRAUDULENT CONVEYANCES—Insolvency.—Where a manufacturing corporation, the principal stockholder of which, who was also a director and the president thereof, was a stockholder, director and the president of an insolvent mining corporation, which was largely indebted to it on book account, proposed to take certain machinery belonging to such debtor corporation, which was not then in use, at a certain price, which was the full value thereof, to be credited on such indebtedness, which proposition was accepted, the presumption that such transaction was fraudulent as to other creditors of such insolvent corporation was not rebutted by the fact that the president thereof, though present, did not vote to accept such proposition.—FINCH MFG. CO. V. STIRLING CO., Penn., 41 Atl. Rep. 294.

46. FRAUDULENT CONVEYANCES—Intent—Possession.—A firm composed of father and son sold to the wife and mother jewelry, which was delivered to her and kept for three months in her house, where she resided with her husband and son, except when she intrusted a part of it to them to sell to obtain necessaries for the family; they returning it on failing to find a purchaser. Held, that there was an actual and continued change of possession, as against creditors.—ROBERTS V. BURR, Cal., 54 Pac. Rep. 849.

47. FRAUDULENT CONVEYANCES—Rights of Parties.—A sale or transfer of property in fraud of the rights of creditors of the vendor is valid between the parties thereto; and it is void as to such creditors only to the extent that they are prejudiced thereby.—LEWIS V. HOLDREGE, Neb., 76 N. W. Rep. 890.

48. HIGHWAYS—Vacation—Injunction.—A town will not, at the suit of an abutting owner, be enjoined from vacating a highway, as the owner has a legal remedy by *certiorari*.—KROEGER V. TOWN OF WALCOTT, Iowa, 76 N. W. Rep. 841.

49. HOMESTEAD — Selection.—Where a wife living apart from her husband selects a homestead in lands owned by her, her selection will not, in the absence of evidence of bad faith on her part in making it, be set aside, and the selection of the husband adopted, though the wife's selection is from the roughest and most unproductive portion of the tract, and cut off from convenient access to a highway.—EHRCK V. EHRCK, Iowa, 76 N. W. Rep. 793.

50. HUSBAND AND WIFE—Enticement of Husband.—Under Civ. Code, § 49, declaring that the rights of personal relation forbid (1) "the abduction of a husband from his wife," etc., and (2) "the abduction or enticement of a wife from her husband," etc., the right of action of the wife is not limited to a case where her husband has been forcibly taken from her, but she has the same right to sue for the enticement of her husband as the husband has to sue for her enticement.—HUMPHREY V. POPE, Cal., 54 Pac. Rep. 847.

51. HUSBAND AND WIFE—Equity—Support of Wife.—This court has no jurisdiction, under its general equity powers, to make a decree for the support of a wife, because of her husband's failure to maintain her.—MARGARUM V. MARGARUM, N. J., 41 Atl. Rep. 357.

52. INNKEEPERS—Liens — Goods of Third Person.—Laws 1893, ch. 102, § 3686, provides that an innkeeper shall be liable for all losses of or injuries to personal property placed by his guests under his care, and on such property the former shall have a lien for his charges; that baggage and other effects "belonging to any person" who shall abscond without paying his hotel bill may be disposed of by the innkeeper at the end of 30 days. Held, that the statute changes the common-law rule, so that an innkeeper has no lien on property leased of a third person, and brought to and left at the hotel by a guest.—MCCLAIN V. WILLIAMS, S. Dak., 76 N. W. Rep. 930.

53. INSURANCE—Vacant Premises.—Control and use of buildings by a tenant without living therein does not amount to occupancy, within a fire policy providing that it shall be void on their becoming vacant and unoccupied.—STOLTENBERG V. CONTINENTAL INS. CO., Iowa, 76 N. W. Rep. 835.

54. JUDGMENT — Execution — Parties.—Where interveners took judgment against an insolvent plaintiff, knowing that the action was brought in plaintiff's name without her knowledge, not as the real party in interest, but to prevent them from collecting any judgment they might secure, the fraud does not authorize an execution against the real party in interest.—BERRY V. WOOD, Iowa, 76 N. W. Rep. 799.

55. JUDGMENT—Res Judicata—Exemption.—The judgment of a court sustaining an attachment does not settle the *status* of the attached property; that is, it does not determine whether or not it was exempt from seizure on attachment.—JOHNSON V. BARTEK, Neb., 76 N. W. Rep. 878.

56. JUDGMENT—Satisfaction by Attorney.—In the absence of special authority from his client, an attorney's satisfaction of a judgment without payment of its amount in cash does not bind the client.—MCMURRAY V. MARSH, Colo., 54 Pac. Rep. 852.

57. JUDGMENT—Vacation.—A judgment regular on its face cannot be set aside on motion attacking its validity.—TUFFREE V. STEARNS RANCHOS CO., Cal., 54 Pac. Rep. 826.

58. JUDGMENT BY DEFAULT—Service.—Where the appearance of an attorney on behalf of a party was wholly unauthorized, and was entered by mistake and inadvertence, and the attorney never assumed to act, a judgment taken by default, without proper service of process, is void.—FLEMING V. BOULEVARD HIGHLANDS IMP. CO., Colo., 54 Pac. Rep. 859.

59. LANDLORD AND TENANT—Action for Rent.—The fact that a tenant remains in possession of the demised premises notwithstanding certain defects, which affect the health and comfort of himself and family, does not amount to an election to continue a tenant notwithstanding subsequent and increased defects which render the premises untenantable and unfit for occupancy.—DAMKROGER V. PEARSON, Minn., 76 N. W. Rep. 960.

60. LANDLORD AND TENANT—Agreements.—Defendant took possession of land under a contract with plaintiff to purchase if the title was satisfactory, but if the title failed to pay rent for one year and surrender the premises. Held that, since the relation of landlord and tenant did not arise until the failure of title, plaintiff could not recover rent under the contract until the

failure of title was shown.—CROSS v. FREEMAN, Tex., 47 S. W. Rep. 473.

61. LANDLORD AND TENANT—Improvements—Subrogation.—Where mechanics and material-men made improvements on leased premises under contract with the tenant, upon the faith of the landlord's agreement that the improvements might be paid for by the tenant out of the rent then due and to become due, they are entitled to the benefit of the landlord's lien to secure their claims, and the landlord cannot defeat them by subjecting the tenant's property to the payment of rent which accrued after the improvements were made.—RUBEL v. AVRITT, Ky., 47 S. W. Rep. 460.

62. LANDLORD AND TENANT — Lease — Validity.—A lessee of premises to be used for traffic in intoxicating liquors in the manner provided by law cannot avoid the lease by failing to comply with the law.—WHALEN v. LEISY BREWING CO., Iowa, 76 N. W. Rep. 842.

63. LIBEL — Evidence — Justification.—In a suit for libel, where the defense is the truth of the matter published, the defendant, to exonerate himself, must establish the truth of each libelous charge made and published.—NEILSON v. JENSEN, Neb., 76 N. W. Rep. 866.

64. LIBEL—Resolution of City Council.—A written publication, characterizing a person as disreputable, and charging him with having maliciously published in a newspaper a false report (knowing it to be false) tending to injure the credit of the city in which he lived, is libelous *per se*, and actionable, unless privileged or justified; and the trial court erred in submitting to the jury the question whether or not the publication was defamatory.—TREBBY v. TRANSCRIPT PUB. CO., Minn., 76 N. W. Rep. 961.

65. LIBEL AND SLANDER—Privileged Communications.—Defendant voluntarily wrote a business acquaintance, advising him that, if a certain note of the acquaintance for $50 was in the hands of a certain "jack leg lawyer," to call it in, as he was in danger of losing it entirely, and that his money was safer where it was than in the hands of such lawyer. Held, that it was not a privileged communication.—SAMPLES v. CARNAHAN, Ind., 51 N. E. Rep 425.

66. LIMITATIONS — Accrual of Cause of Action.—A cause of action accrues upon an implied promise to pay the reasonable value of the services rendered, without agreement as to the time of payment or the length of time such service shall continue, when the service ends.—BLAKE v. PRATT, Kan., 54 Pac. Rep. 806.

67. LIMITATIONS — Action on Check.—An action on a check by the holder against the maker after demand of the drawee and non-payment is a suit on a written instrument, within the meaning of section 10 of the Code of Civil Procedure, and the limitation is five years.—CONNOR v. BECKER, Neb., 76 N. W. Rep. 893.

68. LIMITATIONS — Foreclosure of Mortgage.—An action to foreclose a real estate mortgage, given to secure a note, bond, or other written evidence of indebtedness, may be commenced at any time within 10 years after the cause of action accrues.—CAMPBELL v. UPTON, Neb., 76 N. W. Rep. 910.

69. MANDAMUS — Claims against State Auditor's Warrant.—Under Act March 16, 1897, § 2, authorizing the State auditor "to examine and audit the unpaid claims and accounts outstanding on account of the construction of the State normal building," and to draw his warrants in favor of the creditors, the duty of the auditor is not merely ministerial, and therefore *mandamus* will not lie at the suit of one of the creditors to compel him to issue a warrant.—STATE v. CHEETHAM, Wash., 54 Pac. Rep. 772.

70. MANDAMUS—Justice of the Peace.—Where a justice of the peace dismissed a cause for want of prosecution, *mandamus* will not lie to compel him to make out a transcript on the plaintiff's giving notice of an appeal to the county court, where the petition does not allege that that court had appellate jurisdiction of the cause.—WHITE v. MEYERS, Tex., 47 S. W. Rep. 476.

71. MARRIED WOMEN—Contracts—Performance.—Errors not argued will not be considered. Where the wife was present and took part in the negotiations leading up to a contract to drill a well on her land, and the writing was drawn and signed in her presence, and she, with her husband, orally promised to give a note for her cost of the well, she is jointly liable with him for such cost.—THOMPSON v. BROWN, Iowa, 76 N. W. Rep. 820.

72. MASTER AND SERVANT—Discharge of Employee.—In an action for breach of a contract of employment by a superintendent who was discharged before the end of his term of employment on the ground that he refused to obey instructions, the fact that his employer had employed another superintendent at half the salary which he contracted to pay him is admissible in evidence to rebut the improbability of a discharge without a justifiable cause.—GALLAGHER v. WAYNE STEAM CO., Penn., 41 Atl. Rep. 296.

73. MASTER AND SERVANT—Fellow-servant.—A section boss, in operating the brake on a hand car, is a fellow servant of section hands under him, who, under his orders, are traveling with him on the car; so that the railroad company is not liable for his negligence in losing hold of the brake.—NASHVILLE, C. & ST. L. R. CO. v. GANN, Tenn., 47 S. W. Rep. 493.

74. MASTER AND SERVANT — Fellow-servant — Negligence.—A boss over the wiper in an engine house whose duty it is to give the wipers their orders to clean the locomotives, and to see when they are ready to be moved out, to open the doors of the engine house, give the signal for moving the locomotives, and give orders for the men to adjust the turntable, is not a vice-principal, so as to make the employer liable for his failure to see that the wiper was out from under a locomotive before giving the signal for it to leave the engine house.—KNOX v. SOUTHERN RY. CO., Tenn., 47 S. W. Rep. 491.

75. MASTER AND SERVANT—Injury to Employee — Assumption of Risks.—In the relation of master and servant, whatever may be the negligence of the master to exercise reasonable care to provide a safe place for his servant to perform his work in, or to provide safe appliances for him to do his work with, still when the risks of danger arising are incidental to the employment, and obvious to the servant, or discoverable by the exercise of ordinary care on the part of the servant, the neglect of the master cannot be made the basis of an action for damages for injuries caused by such risks. In law they are assumed by the servant when he enters and continues in the employment.—REGAN v. PALO, N. J., 41 Atl. Rep. 364.

76. MASTER AND SERVANT—Negligence—Injury to Employee.—Where a gang plank is necessary to load machinery, and the master furnished a suitable one, he is not bound to see that it was properly placed.—TRIMBLE v. WHITIN MACH. WORKS, Mass., 51 N. E. Rep. 463.

77. MECHANICS' LIENS — Priority — Mortgages.—The lien for labor and material furnished for "improvements and repairs" is superior to a deed of trust on the property executed after the work and materials were furnished.—SIOUX CITY ELECTRICAL SUPPLY CO. v. SIOUX CITY & LEEDS ELECTRIC RY. CO., Iowa, 76 N. W. Rep. 838.

78. MINING CLAIMS—Validity of Contract to Convey.—Neither the statute nor public policy renders invalid a contract made in settlement of litigation over a disputed boundary between mining claims, by which one of the claimants binds himself, on obtaining title from the United States, to convey the portion in dispute to the other.—ST. LOUIS MINING & MILLING CO. v. MONTANA MIN. CO., U. S. S. C., 19 S. C. Rep. 61.

79. MORTGAGES—Variance between Mortgage and Petition.—A slight variance between the description of land given in a judgment enforcing a mortgage lien and that given in the petition or mortgage will not invalidate the sale or judgment, in the absence of an averment showing that land has been sold which was

not covered by the mortgage.—MITCHELL v. FIDELITY TRUST & SAFETY-VAULT CO., Ky., 47 S. W. Rep. 446.

80. MORTGAGES—Writ of Assistance.—The writ of assistance is an effective and appropriate process to issue from a court of equity to place the purchaser of mortgaged premises under its decree in possession after he has received the sheriff's deed, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its direction. The assignee of the purchaser's bid stands in the purchaser's place, as to the remedy for possession.—MOTZ v. HENRY, Kan., 54 Pac. Rep. 796.

81. MORTGAGE FORECLOSURE—Setting Aside Sale.—A judgment creditor who has levied on the land of his debtor may, in aid of his execution, maintain an action to set aside and have adjudged void a foreclosure, under a power of sale of a prior mortgage executed by his debtor, on the ground that notice of sale was not served on the person in possession of the mortgaged premises, but the certificate of sale and affidavits of sale and of service of notice placed on record show on their face a valid foreclosure.—SWAIN v. LYND, Minn., 76 N. W. Rep. 958.

82. MUNICIPAL CORPORATION — Defective Sidewalk—Contributory Negligence.—One who, knowing the icy condition of an apron connecting a street and sidewalk, and built without cleats at an incline of 14 inches for 7 feet, stepped on it, when he easily could have gone round it, was guilty of contributory negligence.—MARSHALL v. CITY OF BELLE PLAINE, Iowa, 76 N. W. Rep. 797.

83. MUNICIPAL CORPORATIONS — Negligence of Lessee of Wharf Privileges.—A city is not liable for injury to property on a wharf boat resulting from the negligence of one to whom the city had leased the boat and the wharf privileges.—CARROLLTON FURNITURE MFG. CO. v. CITY OF CARROLLTON, Ky., 47 S. W. Rep. 439.

84. MUNICIPAL CORPORATIONS—Ordinances—Electric Light Companies.—A city officer may refuse to sign the orders necessary to enable an electric light company to obtain warrants for their bills for lighting the city streets according to their contract, on the ground that the city has a claim for the violation of an ordinaece, passed before the contract was made; requiring the company to light all police and fire stations free of cost, though no ordinance forbidding him to sign the orders has been passed.—KENSINGTON ELEC. CO. v. CITY OF PHILADELPHIA, Penn., 41 Atl. Rep. 309.

85. MUNICIPAL CORPORATION — Ordinances—Fees for Services.—A city ordinance providing that, when a physician is called on by the coroner to conduct a post-mortem examination, the mayor shall be authorized to allow such physician a fee not to exceed $25, gives the mayor a discretion, which having been exercised by refusal of allowance is conclusive.—FRANK v. CITY OF ST. LOUIS, Mo., 47 S. W. Rep. 508.

86. MUNICIPAL CORPORATIONS—Powers—Water-works.—Where a borough has, by legislative authority, constructed its own municipal water-works by means of an authorized partnership with a water company, it cannot, while such legislation exists, and it is supplying itself with water thereunder, enter into another contract for water with a private corporation, where the statute authorizes it merely to adopt either one of the two methods.—CARLISLE GAS & WATER CO. v. CARLISLE WATER CO., Penn., 41 Atl. Rep. 321.

87. MUNICIPAL CORPORATIONS—Warrants—Validity.—Where a city had on hand, or in prospect, at the time warrants exceeding the prescribed limit of indebtedness were issued, funds with which to meet them without trenching on the rights of creditors for current expenses, such warrants are valid, although such funds may have been thereafter wrongfully applied to other purposes.—PHILLIPS v. REED, Iowa, 76 N. W. Rep 850.

88. MUNICIPAL CORPORATIONS — Water Supply—Ordinance—Validity.—Where an ordinance authorizing the erection of water-works and the supply of water through hydrants of a certain number and at certain rentals was otherwise duly passed held that a suspension of the rule requiring it to be read only once on each of three different days unless this rule was suspended was sufficiently complied with where there were present four councilmen, all of whom voted for the suspension; the entire council consisting of six members, of whom one had resigned, and another was absent when the suspension took place.—CITY OF NORTH PLATTE v. NORTH PLATTE WATERWORKS CO., Neb., 76 N. W. Rep. 906.

89. NEGLIGENCE — Electricity — Care Required.—An electric light company is liable for injuries resulting from its failure to furnish perfect protection from electric currents at points where persons will probably come into contact with its wires, it not being sufficient to relieve it from liability that it has exercised the "highest degree of care and skill usually exercised by prudent persons, engaged in the same or similar business, to keep its wires so insulated as to be reasonably safe and free from danger."—OVERALL v. LOUISVILLE ELECTRIC LIGHT CO., Ky., 47 S. W. Rep. 448.

90. NEGLIGENCE—Torts of Infant—Liability of Parent.—In an action for damages in consequence of the alleged negligent use of a gun in the hands of defendant's minor son, the complaint set out a sufficient cause of action, where defendant was connected with such injurious act by allegations that he had purchased and given his son a gun, that such son was in the habit of using it negligently, and that defendant knew he was so using it, and encouraged and consented to such negligent use thereof.—JOHNSON v. GLIDDEN, S. Dak., 76 N. W. Rep. 983.

91. PARTNERSHIP—Preliminary Work—Contracts.—An action at law will lie on an agreement by the other members to pay a member their share of the expense of work done by him in launching the partnership.—WAUGH v. EDEN, Colo., 54 Pac. Rep. 858.

92. PHYSICIANS—Unlawful Practice.—Under section 16, art. 1, ch. 55, Comp. St., any person not within the exceptions prescribed by said article, and not having complied with its requirements as to certificate and registration, who shall, for a remuneration, operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another, is liable to the penalties of said section, although the operations were performed, and the medicines were administered and given, under the direction and charge of a licensed physician and surgeon.—STATE v. PAUL, Neb., 76 N. W. Rep. 861.

93. PHYSICIANS AND SURGEONS—Certificate—Revocation.—Under Acts 21st Gen. Assem. ch. 104, authorizing the State board of medical examiners to revoke certificates to practice medicine "for palpable evidence of incompetency," evidence which tends to prove or disprove the competency of an accused may be introduced, though not the best evidence which might be had.—TRAER v. STATE BOARD OF MEDICAL EXAMINERS, Iowa, 76 N. W. Rep. 833.

94. PLEADING—Verification—Abatement.—The verification of a plea in abatement, "The defendant makes oath that the statements in the above plea are true," is sufficient, without addition of the words, "in substance and in fact."—ARMSTRONG v. STATE, Tenn., 47 S. W. Rep. 492.

95. PRINCIPAL AND AGENT — Authority of Alleged Agent—Ratification.—On the trial of issues involving the authority of an alleged agent to make purchases on account of the defendant, evidence that the defendant became guarantor to others than the plaintiff for the payment of the price of similar articles purchased by the alleged agent upon his own account is not competent for the purpose of showing either a previous authority or a ratification.—WILLIAMS v. STEARNS, Ohio, 51 N. E. Rep. 439.

96. PROCESS — Summons — Sufficiency.—Under Code Civ. Proc. § 407, providing that a summons shall notify defendant that, unless he appears and answers, plaintiff will take judgment for the money or damages demanded as arising on contract, or will apply for an

other relief demanded by the complaint, it is not necessary that a summons state the nature of the cause of action against the defendant.—STANQUIST v. HEBBARD, Cal., 54 Pac. Rep. 841.

97. PUBLIC LANDS—Execution.—A locator's interest in a mining claim on public lands for which no patent has been issued nor applied for is property subject to execution.—PHŒNIX MIN. & MILL. CO. v. SCOTT, Wash., 54 Pac. Rep. 777.

98. RAILROAD COMPANY — Street Railroads — Negligence.—A boy eight years and four months old got upon the rear platform of a street car, intending to ride thereon to his home, several blocks distant. While sitting upon this platform with his feet upon the car step, where there was no gate, the car started, and while it was running fast the boy became dizzy, fell off and was injured. The motorman (who was also conductor) knew that the boy was on the car. Held, that merely getting upon the car sitting down on the platform with his feet on the step was not *prima facie* evidence that the boy was a trespasser, and whether he was a passenger or trespasser it was not error for the trial court to submit to the jury the question whether it was negligence on the part of the acting conductor to permit him to ride, sitting in that position, while the car was running fast.—JACKSON v. ST. PAUL CITY RY. CO., Minn., 76 N. W. Rep. 956.

99. RELIGIOUS SOCIETIES — Division of Property.—Where a church is organized and a building erected by an independent religious organization, and afterwards dissension arises among the members thereof as to which, if either, of two branches of the parent organization they should unite, and by reason of such dissension it becomes impracticable to longer remain together, it is not error for the district court to decree a division of the property.—IMMANUEL'S GEMEINDE v. KEIL, Kan., 54 Pac. Rep. 800.

100. REWARDS—Officers.—A ministerial officer who, in the performance of his duties as such, recovers and returns to its owner stolen property, is not entitled to recover a reward offered by the owner for such recovery and return.—MILLER v. HOGEBOOM, Neb., 76 N. W. Rep. 888.

101. SALES—Acceptance of Goods—Waiver.—Where goods are accepted by the buyer without objection, he is liable for the price, in the absence of a warranty, notwithstanding the goods are not of the quality ordered.—SCHOPP v. TAFT, Iowa, 76 N. W. Rep. 843.

102. SALE OF CHATTEL PROPERTY—Payment in Installments.—Sales of chattel property, to be paid for in whole or in part in installments, on condition that it shall belong to the purchaser when the amount paid thereon shall be a certain sum, or the value of the property, the title to remain in the vendor until such amount shall be paid, are, when made subsequent to the act of May 4, 1885, now sections 7913-72, 7913-73, of the Revised Statutes, governed by the provisions of that statute; and the rights of the purchaser under the statute are unaffected by the execution of a mortgage on the property at the time of the sale to secure installments of the purchase price.—SPEYER v. BAKER, Ohio, 51 N. E. Rep. 442.

103. SHERIFFS—Fees—Attendance on Criminal Courts.—Though a statute requires a sheriff to attend certain criminal courts, he cannot recover fees therefor, in the absence of statutory provision.—STATE v. BROWN, Mo., 47 S. W. Rep. 504.

104. TAXATION—Literary, Benevolent and Scientific Corporations.—A corporation organized under Pub. St. ch. 115, § 13, having for its paramount object the dissemination of theosophical ideas, and the procuring of converts thereto, is not a "benevolent" or "charitable" institution, within ch. 11, § 5, cl. 3, as amended by St. 1889, ch. 465, exempting such from taxation.—NEW ENGLAND THEOSOPHICAL CORP. v. CITY OF BOSTON, Mass., 51 N. E. Rep. 456.

105. TAXATION—Right to Acquire Tax Title.—Where a person was to pay taxes on mortgaged property for the mortgagee, and had money of the latter's with which to do it, he cannot acquire a tax title as against the mortgagee.—YOUNG v. GOODHUE, Iowa, 76 N. W. Rep. 822.

106. TELEGRAPH COMPANY—Error in Telegram—Negligence.—A telegraph company is liable for all damages sustained by reason of its failure to correctly transmit and deliver a message received by it, notwithstanding an agreement printed on its blanks to the contrary.—WESTERN UNION TEL. CO. v. BEALS, Neb., 76 N. W. Rep. 903.

107. TENANCY IN COMMON—Right to Possession.—A tenant in common is entitled to recover possession of the entire premises, as against a stranger not claiming as a co-tenant, though the other co-tenants are not parties to the action.—MATHER v. DUNN, S. Dak., 76 N. W. Rep. 922.

108. TENDER—Fraud.—A tender or reimbursement of moneys advanced by one who purchased land at a sheriff's sale in fraud of the rights of the owner is not a condition precedent to the maintenance by the latter of a bill seeking a reconveyance upon repayment of the amount ascertained to have been thus advanced.—MCGEARY v. JENKINS, Penn., 41 Atl. Rep. 315.

109. TRUSTS—Express Trust.—The agreement made at time of a conveyance of land that the grantee should pay off incumbrances thereon, and should reconvey on the grantor repaying him the money so advanced, creates an express trust, which Rev. St. 1889, § 5184, declares shall be in writing.—HILLMAN v. ALLEN, Mo., 47 S. W. Rep. 509.

110. TRUSTS—Misappropriated Funds.—One who, in good faith, receives money from another as security against loss as surety on the bond of the other as trustee, can hold it, though the other had misappropriated it as receiver of a bank.—SPAULDING v. KENDRICK, Mass., 51 N. E. Rep. 453.

111. USURY—Recovery of Statutory Penalty from National Bank.—Rev. St. U. S. § 5198, authorizing a person who has paid usurious interest to a national bank, or his "legal representatives," to recover back twice the amount paid, does not give to the debtor who has made such payment the right to transfer the claim, under the statute, so as to entitle his assignee to recover the penalty.—PARDOE v. IOWA STATE NAT. BANK, Iowa, 76 N. W. Rep. 800.

112. VENDOR AND PURCHASER—Rescission of Contract.—Where plaintiff in an action for damages on rescinding a contract, for alleged false representations on the part of defendants, asks only a money judgment, such action can only be at law.—WATSON v. BARTHOLOMEW, Iowa, 76 N. W. Rep. 858.

113. WILLS—Powers of Appointment.—The testator's will directed his widow to divide his real estate between his children, "to the best advantage as she sees fit and proper." In its decree of distribution the probate court assigned the real estate to the widow, "subject to the conditions and provisions of the will." Held, she did not, by the terms of the decree, take the real estate for her own use and benefit, but was still required to divide it between the children, and, in doing so, could not exclude any of them.—FALOON v. FLANNERY, Minn., 77 N. W. Rep. 954.

114. WILLS—Precatory Trust.—Testator devised his residuary estate to his wife, and provided that it was given to her to the end that she might provide a home where she could receive the children, and that he was confident that it would be equally divided among all of them when she no longer needed it. Held, that the wife took the property absolutely, and not on a trust to divide it equally among the children on her demise.—ALDRICH v. ALDRICH, Mass., 51 N. E. Rep. 449.

115. WILLS—Undue Influence.—The mere fact that a son to whom his father willed practically all his property had lived with and taken care of his parents in their old age is not evidence of undue influence.—AYLWARD v. BRIGGS, Mo., 47 S. W. Rep. 510.